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# JUDGE AND JURY

A POPULAR EXPLANATION  
OF  
LEADING TOPICS IN THE LAW OF THE LAND

BY  
BENJAMIN VAUGHAN ABBOTT



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## P R E F A C E.

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THE first glance at the pages of this volume will show that it is not a professional treatise, nor an "Every man his own lawyer." The lawyer who may obtain it will find it quite as appropriate to the household as to the office. The merchant will be more likely to enjoy it on a journey than to consult it on business questions in the counting-room. Its purpose is different from those of either the professional or popular law-books heretofore published. That purpose is to depict, for the intelligent general reader, the law of the land upon topics of general public interest. Every reader of the journals and magazines is daily confronted with allusions to the statutes and the decisions of the courts. There are many branches of the law the rapid growth and important changes in which have kept them prominent in public attention; and there are many others which affect so many persons that any one may well be interested in brief systematic explanations. This volume is devoted to these topics; and it aims only at giving a correct and readable account of the leading aspects and general principles of modern jurisprudence.

Thus, it gives an outline of our government and our courts and their law-books. It then explains what the courts have decided upon leading subjects within the United States' jurisdiction, such as citizenship and civil rights, the Indians and the Chinese, banking and commerce, and other matters of current interest in this field. Prominent subjects more particularly within State jurisdiction follow. The conflict of the marriage laws, the great change as to the rights of married women, the startling difficulties respecting divorce, are discussed. The progress which the States have made in codification is delineated, with sketches of the new practice; of the marriage of law and equity; the *death and burial of John Doe*; and antique curiosi-

ties of special pleading. The State laws, most of them new, and all of them of general interest, relative to suing the liquor-seller, cruelty to animals, lotteries, and Sunday observance, are reviewed, with numerous anecdotes of their practical operation. Rules which bear upon every-day life and have entertaining aspects are then explained, giving the law of driving and walking, finding and stealing, tumble-downs, gas-explosions, homesteads and "French flats," strange uses of photographs, and common but reprehensible uses of firearms and fireworks. Doctors, druggists, and school-teachers may find some anecdotes bearing upon their vocations; and lawyers will concur in the counsel given against drawing one's own will. Travel and transportation receive attention; dealings with expresses and telegraphs are explained, with a full sketch of the law of a railroad trip.

There is no attempt to marshal numerous authorities; salient, representative decisions are given when they promise to illustrate the principle under discussion, but not otherwise. The author has endeavored to give a trustworthy general statement of the law. Yet the reader is requested to remember that there are thirty-eight States, whose laws on any given subject may, and often do, differ. No effort is here made to pursue these differences in detail.

Readers of good memories will sometimes meet a paragraph which seems familiar. The explanation is that before 1876 the general editor of Harper's First Century of the Republic invited the author to contribute to that work a brief description of the growth of jurisprudence throughout the century. He did so; and the paper, as published, gave rise to calls for others in the same vein, resulting in the preparation of numerous popular articles upon law topics, which appeared in the *New-York Times* and *Tribune*, *The Christian Union* and *Congregationalist*, and other periodicals. Portions of such papers, rewritten and enlarged, have been used as materials in several of these chapters.

With respect to some excellent subjects which are omitted, the author can only say that he wishes the book were larger, and he hopes the reader will concur in that wish.

BENJAMIN VAUGHAN ABBOTT.

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## I.

# PRELIMINARY TOPICS.

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### CHAPTER I.

#### CONSTITUTIONAL GOVERNMENT.

THE reader will not desire to spend much time over a discussion of constitutional government. The leading aspects of that subject relate to the political and social progress of the country rather than to judicial history. This volume embraces the history of what has been accomplished by the courts. But courts derive their authority from constitutions, and have had an important duty in expounding and enforcing them. Some notice of the constitutional origin and powers of courts is a proper preliminary.

#### GENERAL NATURE OF A CONSTITUTION.

The art of administering government according to the directions of a written constitution may justly be claimed among the products of American thought and effort during the century. It is not understood by all that the system is so recent in development; and many who live and prosper under our government, and who trust and love it, are hardly aware of the strong contrast in fundamental principle between it and older European systems. It is of American origin and recent growth. Our fathers devised it without much aid from Old-World precedents. The adoption of written constitutions by Virginia and Pennsyl-



vania in 1776, and by other states not long afterwards, upon recommendation of the Continental Congress, initiated this method, which has become essential to the general security, prosperity, and progress of our country. There were, indeed, according to generally accepted tradition, articles of compact framed and subscribed between members of the early companies of colonists, which embodied the germ of the plan; but the whole practical development of it, in existing forms, belongs to our first century.

It is true that instances of a written resolution adopted by a people for the guidance of the government existed before the era of the revolution, and that such have been known abroad as well as in this country. All such instruments were, however, very limited in scope as compared with the "constitutions" used at the present day. And they—the European ones especially—embody a different principle from that of a constitution. They do not purport to create and organize a government; but, assuming a government as already existing, they seek to impose restrictions upon its action. Take *Magna Charta* as an example of a state-paper popularly supposed to be of the nature of a constitution. There was a government already in full sway, of traditional origin; claimed to be founded upon conquest, or divine or hereditary right; administered by an executive power transferred by descent; and taking little from the people except obedience and supplies. The barons complained of the usurpations and excesses of the crown. Complaints rose to resistance, and resistance to conquest. The crown was compelled to give pledges to administer justice more impartially, respect the liberty of the subject, reduce taxation, and refrain from various abuses. These restrictions, imposed upon a tyrannical government by the people, form *Magna Charta*. Now this principle is just the reverse of a constitution as we in America understand that term. It signifies an instrument far more fundamental than any of the state-papers of past centuries. Our idea is that there is no di-

vine or hereditary right, but that all the powers of government, all the authority which society can rightly exercise towards individuals, are originally vested in the masses of the people; and that the people meet together (by their delegates) to organize a government, and then freely decide what officers they will have to act for them in making and administering laws, and what the powers of those officers shall be. These written directions from the people, declaring what their officers may do and what they may not do, form the constitution. A constitution is a grant of existence and powers from a people to a government. A charter is a grant of privileges or securities from a government to subjects. The idea of constitutional government, in its practical development, is modern and American.

The course of jurisprudence through the past century has shown that it is possible, and, with the short, though severe, exception of the civil war, that it is not difficult, for an intelligent, conscientious, self-controlled community, who realize that the will of the people is the source of power, to create and administer government by these written constitutions. It has been practicable to have these writings framed. The thirteen colonies, in obedience to the suggestions of their Congress, and notwithstanding the embarrassments and discord of the period, severally adopted constitutions at a very early day; and from time to time since, as new communities in the territories have grown to sufficient numbers, they have been prompt to ask an enabling act from Congress, and have readily given the time and attention needed for assembling a convention of delegates to prepare a constitution, and for holding a popular election to enact it. It has been practicable to have these writings expounded. The judiciary created by a constitution sits clothed with power to explain whatever doubtful provisions may be found therein, and to test the acts of the Legislature by the constitutional standard; and these decisions have been readily accepted. It has been practicable to secure obedience. Throughout the land

a constant succession of elections has been held pursuant to the directions of the constitution; the defeated candidates have retired cheerfully; the successful ones have assumed the powers, privileges, and duties prescribed by the written organic law, have administered them through the defined term, and have obediently relinquished them at its close, to constitutionally elected successors. It has been practicable to have these constitutions amended. They do not become rigid, iron-bound shrouds stifling the development of institutions, but contain a germ and a stimulus of growth such as the future may demand.

#### STATE AND NATIONAL ORGANIZATIONS.

The character of the somewhat complex system of government which has become established over the United States has been the subject of much discussion among political writers and theorists. For, while the duties of the various members and officers of government are well described in the constitutions, those instruments give very little theoretic explanation of the nature of the Union intended to be formed. Many theories have been propounded; they can be generalized in three types. Brief views will be given of these three leading conceptions of American government; a volume might be written in explanation of each.

At one extreme stands what has been called the "State Rights" theory, which presents the constitution as a species of treaty or compact between the State governments. According to this view, the movement for independence was a movement to make the colonies independent States. To accomplish this purpose, the colonies united in a common effort, the chief instrument of which was the Continental Congress, which is to be deemed a temporary alliance of neighboring governments against a common enemy, and the success of which effort made the States sovereign and independent. Desiring to organize a mode of securing common interests, they, the State governments, formed



an alliance or compact for that purpose, which was the old Confederation. Finding this compact inefficient, the States rescinded it and formed another, more intimate and vigorous, which is the constitution; and this likewise is a compact between the States—of thirteen States at early date, but since accepted and assumed by others which have sprung into existence by political acts of the inhabitants of new territories.

At the other extreme stands a theory that the Union is the original government, the earlier of the two, and that the State governments have derived their existence from it, or by its authority and protection. Upon this view, the colonies, before they attained existence as States, being desirous to achieve independence, formed a Union under the Continental Congress, which, indeed, was not very formally organized, and was incomplete and inefficient as to many subjects, but yet was a real, national government, by the military operations of which the colonies were set free from foreign control, and by the permission of which, after they were free, State governments were organized for the exercise of such powers as were not vested in the Union. These governments, at the demand of the Union, conceded a more explicit statement of the powers and authority of the latter, in the old Articles of Confederation; and still later, by the constitution, surrendered to the national government those broad powers which it now wields. The Union, having given liberty and political existence to the thirteen States, and having acquired extensive territory and national jurisdiction beyond their limits, has authorized the settlement of that territory, and has from time to time organized the settlements into States: these are created by the Union, and come into existence subject to its proper national authority.

A medium view may be stated thus: that the colonial governments were not in any proper sense even the germs which ripened into the governments now existing, but were creations of foreign authority, and perished with the sundering of the

ties which united our ancestors to the land of their origin; that when, not the colonial governments, but the people of the colonies, became weary of foreign rule and declared themselves independent, this, whether manifested by means of the forms and officers in use in colonial government, or by other modes, was a revolutionary and popular act, and not an act of the governments then existing; and the independence which it established was one which emancipated the people from any government, colonial or other, of English origin, and involved annihilation of colonial governments, rather than one which freed those governments from foreign rule, permitting their expansion and development; and they, the people, then became the true and ultimate source of all political power; though whether the time when they declared this right, or the time when the adversary acquiesced in it, should be taken as the birthday of the principle is a question of some nicety. The people within what had been the thirteen colonies did, by adoption of State constitutions, and other less formal and distinct but really popular acts, establish State governments; and these State governments allied themselves for mutual defence and other public purposes, under the old Articles of Confederation. This attempt of the States to provide for the general welfare by a compact proved inefficient; upon which the people did, by a new original act, revolutionary though peaceful, and popular though in part performed by the use of State-governmental instrumentalities, withdraw from the States a portion of their powers, and vest them, as expressed in the constitution, in a new and national government. Since that time, new communities of people, coming into existence in newly settled territories, have formed new State governments (which cannot be done, indeed, but by the Union's consent, yet is done by the people); and they have also, by further consent of the nation, united in the general government. As the general result, the American people have established a duplex political system—a national government for national purposes, for for-

eign relations and duties common to all their communities; and a government by States, for objects local or peculiar, or colored by the diverse situations, circumstances, and desires of the different communities.

The third of these views, the medium one, seems, upon the whole, to have the strongest support from history, from the results of the civil war, and from the general preferences of the people. It has also received distinct adoption as the view of the judiciary. The Supreme Court at Washington has said, as early as 1819\* and as recently as 1874,† that the act of adopting the national constitution was the act of the people, and not of the State governments; and that the people have thus created two governments distinct from each other. The views of the Supreme Court on such topics, if not obligatory upon the political departments of the government, and not necessarily controlling in the administration of affairs of State, are conclusive for all the purposes of jurisprudence; and establish, as far as courts are concerned, the theory of a dual, popular government.

#### STATE AND NATIONAL POWERS.

It has been a generally accepted postulate of constitutional construction that the Union must be regarded as a government of limited powers, while the States are governments of general or full powers, except as the national constitution or that of the particular State imposes restrictions. In other words, the State government is the repository of all sovereignty, authority, and sway which are appropriate to republican government, and which are not prohibited by the national or withheld by the State constitution; and whoever impeaches a State law must show that it transcends limits which, by one or the other instrument, have been set to State authority. The national government is deemed

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\* *McCulloch v. Maryland*, 4 *Wheat.* 316, 402.

† *United States v. Cruikshank*, 92 *U. S.* 542.



vested only with such authority and power as has been conferred; and the judiciary, in passing upon the validity of a law of Congress, requires whoever asserts the law to show that it is sustainable under one or more of the seventeen distinct powers\* expressly granted by the constitution to Congress, or that it is a law "necessary and proper" for carrying them into execution. This general clause, "necessary and proper," as it has been expounded by the Supreme Court, has opened the way to important and rapid development of the powers expressly conferred.

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\* As several of these powers must be hereafter referred to in explaining the rapid development of jurisprudence under them, they may, perhaps, well be given. They are substantially as follows: 1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; 2. To borrow money on the credit of the United States; 3. To regulate commerce with foreign nations and among the several States and with the Indians; 4. To establish a uniform rule of naturalization and uniform laws of bankruptcy throughout the United States; 5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures; 6. To provide for the punishment of counterfeiting the securities and current coin of the United States; 7. To establish post-offices and post-roads; 8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; 9. To constitute tribunals inferior to the Supreme Court; 10. To define and punish piracies and felonies on the high seas and offences against the laws of nations; 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; 12. To raise and support armies; 13. To provide and maintain a navy; 14. To make rules for the government of the land and naval forces; 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; 17. To exercise exclusive legislation over the District of Columbia, and also over all places purchased for forts, magazines, arsenals, dock-yards, and other needful buildings; 18. To make all laws necessary and proper for carrying into execution the foregoing powers.

Its meaning came before the court in a famous case\* involving the question, Can Congress incorporate a bank? No one claimed, of course, that any such power is expressly given; and opponents of the charter contended that it was not necessary or proper, because the national government could, if it chose, perform all its proper functions by means of State banks, or ordinary commercial dealings, and without relying on a corporation of its own creating. But Mr. Webster argued that Congress is not confined to laws which are indispensable to the execution of the granted powers, but the "necessary and proper" clause includes all laws suitable to the object; such as are best and most useful to the end proposed. Any instrumentality best fitted to the execution of an authorized purpose (and not specially prohibited) may be employed; and if a bank is a fit means for executing the revenue and fiscal powers conferred on Congress, it may be employed. And this view was sustained by the court. Chief-justice Marshall said, in effect, that "necessary," in the connection, imports no more than convenient, essential, or useful to some end in view. To employ means necessary to an end is generally understood as meaning to employ means calculated to produce the end, not as being confined to some single means without which the end would be unattainable. Necessary admits of degrees: a thing may be necessary, very necessary, or absolutely necessary. It is in the looser sense that the word is employed in that clause of the Federal constitution which empowers Congress to pass laws necessary and proper for carrying its express powers into effect.

This was in 1819, and by the Federal judiciary. The view has not been abandoned, nor has it failed of acceptance among State tribunals. In 1864 the question was brought before the Indiana Supreme Court † of the power of Congress to create legal-tender

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\* *McCulloch v. Maryland*, 4 *Wheat.* 316.

† *Thayer v. Hedges*, 23 *Ind.* 141.



notes; and that court explained the clause in question as including all such means as are appropriate, plainly conducive to the end authorized to be attained, and not prohibited by or inconsistent with the letter and the spirit of the instrument. And the court reasoned that to restrict the words to a signification which would deny to Congress the choice of means, and confine it to such only as are indispensably necessary, would be absurd; there are several substantive powers expressly granted by name which would thus be utterly denied; for it could be truly said of any means which might be suggested for the execution of either of the express powers that some other might be employed, and therefore that the one suggested was not a necessary one. This construction is sustained by many other authorities. It is established, and has rendered possible the development of national achievement which our generation has witnessed.

#### LEGISLATIVE AND JUDICIAL POWERS.

All readers understand that the constitutions are framed upon the plan of a distinct separation of the powers of government into three classes—legislative, executive, and judicial—intrusted to officers independently constituted. The general nature of the division between legislative and judicial power is now understood more distinctly, perhaps, but not differently from what it was at the inception of the governments. A progress affecting this distribution is, however, noticed in two points. One is the full and explicit development of a power of the judiciary to revise acts of legislation upon the question of constitutionality. It is well established that the Supreme Court has final authority to annul any law which conflicts with the national constitution, and that the superior judiciary of the State has like authority to annul an act of the legislature for violating the constitution of the State. The growth of this principle has brought the judiciary prominently forward as a repository of important power.

The other change consists in a marked tendency to restrict,

by constitutional changes, the powers of the legislature; and the restrictions affect the frequency of their sessions, the length of time they may sit, and the character of the laws they may pass. The earliest constitutions, as a rule, authorized, apparently as a matter of course, annual sessions; forbore to restrict them in length; and conferred the legislative power in very general terms, the chief limitations to be gathered from most of them being those deducible from bills or declarations of rights. The steady progress has been towards restriction. Only eight States out of the thirty-eight now allow annual sessions. The plan of a session once in two years has thus been adopted in more than three quarters of the States; and an avowed and principal reason for the change has been to diminish the frequency and number of new laws. In old times legislatures might continue their sessions as long as they saw reason; now, in most of the States, they are limited to a term (sixty, ninety, or a hundred days), or sometimes have had their pay limited to a term, leaving them to serve longer without compensation, if the public necessity was sufficiently urgent. Still more important is the change made in imposing restrictions upon the kind of laws a State legislature may pass. Rules that special laws shall not be passed when general ones will answer, that divorces must not be granted, that charters shall not be given or taxes imposed, except in certain ways or subject to given conditions, are frequent in the recent constitutions; and some of them contain a long series of these limitations upon the legislative authority. Thus the progress of development of constitutional law is towards diminution of legislative authority by increased reservations of control to the people.

## CHAPTER II.

## BIRD'S-EYE VIEW OF AMERICAN COURTS.

THE purpose of the American people to create a duplex government involved a necessity for a twofold system of courts; and the unanticipated but extensive spread of national sway over new territories has required a third class. Thus it has been necessary to bring into operation national, state, and territorial courts of a variety of powers; each class independent, in great measure, of the others, yet all harmonious. The steadiness, rapidity, and concord with which this has been done, and the complexity, magnitude, and efficiency of the judicial system thus created, may well excite admiration.

## THE UNITED STATES COURTS.

By the constitution itself, the people directly created a Supreme Court of the United States, clothed with power to try, originally, certain controversies of high political importance, and also to review and correct decisions of subordinate courts; and Congress, under authority of the constitution,\* has created, for the ordinary administration of justice throughout the States, in controversies coming within the national jurisdiction, a system of Circuit and District courts. These three—the Supreme, Circuit, and District courts—are what are usually (not invariably) meant by the expression “the United States courts.” A full enumeration of all courts existing by national authority would include others, such as the local courts of the District of Columbia; also the Court of Claims, established for the deter-

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\* No. 9 of the powers of Congress, *ante*, p. 8, note.



mination of claims preferred by individuals against the government of the Union.

The controversies intrusted to these United States courts (omitting to mention some of rare recurrence) are of three kinds: cases arising under any law of the United States; cases of admiralty jurisdiction, that is, arising at sea or immediately connected with maritime matters; and cases between citizens of different States. It was consistent with the general plan of confiding to the States all local or separate concerns, and to the Union all general and national affairs, that a controversy depending on the laws of the Union or upon the general maritime law of the commercial world should be referred to the courts of the Union, for they might be expected to determine such questions more uniformly and consistently than could be done by thirty or forty independent State tribunals. Controversies between citizens of different States are referred to the national jurisdiction for other reasons, largely to secure protection against any favor or partiality which courts of one State might bestow upon its own citizens. To carry this system into practical effect, the States have been divided by Congress into judicial districts. Originally each State was a district. Gradually the larger States have been divided into two or three; and the aggregate number of the districts is, at the present day, about sixty, and is liable to be changed at any session of Congress. The districts have been grouped in circuits, of which there are nine; and for each circuit there is a circuit judge. These two classes of judges hold United States Circuit and District courts at designated places throughout the States, systematic provision being made for court-rooms, clerks, marshals, and records; so that, everywhere, individuals concerned in controversies depending on national laws, or arising upon matters of maritime origin, or in which citizens of one State are pitted against those of another, may seek justice in a court of the Union, free, by its creation and surroundings, and by all its precedents and tradi-

tions, from any undue influence arising from differences among the States.

The decisions of the Circuit and District courts may be reviewed, in all proper cases, by the Supreme Court.

#### THE STATE COURTS.

The organization of an appropriate system of tribunals in the various States is no less complete and thorough, though less easy to be briefly described. In nearly every State there is a Supreme Court, the judges of which, separately, visit various county seats at stated times to hold jury trials, and afterwards meet and hold court together to review and correct the decisions made by each other in their circuits. In New York, decisions of the Supreme Court may be reviewed in a Court of Appeals, whose only function is to revise what has been done in lower courts; it does not try causes in the first instance at all. Similar appellate courts have been established in Delaware, Kentucky, Maryland, New Jersey, Texas, Virginia, and West Virginia. But usually the Supreme Court of the State is the highest court; and the decisions of the full bench of judges of that court settle the law for the State upon all questions falling within the sphere of State government. If the authority and powers of the national government are involved in the case, there is a mode by which it may be carried to the Supreme Court of the United States for final decision.

For each of the counties into which the States are divided there is, as a general rule, a court for the trial of suits, known as the Court of Common Pleas, the County Court, the Circuit Court for the county, or some similar name. These take cognizance of suits of less importance than those allotted to the Supreme Court, according to directions given by the legislature, and which vary in the different States. There is also, generally, in each county, a court for the care of estates of deceased persons, and superintendence of orphans and lunatics, and for other matters involving legal care of property without active lawsuits;

which is variously styled Court of Probate, Orphans' Court, Surrogate's Court, or the like, in different States. One town in each county is designated by law as the county seat where these county courts shall be held, and where all the judicial and public records of the law business arising in the county shall be preserved.

The counties, again, are, except in some unsettled regions, divided into townships or towns, and throughout these are justices of the peace, who have authority to try lawsuits involving smaller amounts or founded on minor wrongs.

In many of the larger cities, where it has been found that the general system is not adequate to the volume of judicial business arising in the place, additional courts for the city are established. Thus in New York, in Buffalo, in Cincinnati, in Indianapolis, there is a "Superior Court;" in Brooklyn there is a "City Court." And, for similar reasons, the justices of the peace are in some cities organized into quite a formal system of courts.

For the trial of crimes there is, as a general rule, a similar arrangement to that for civil controversies above described. Petty offences may be tried before a justice of the peace. For offences of a higher but medium grade there is very often a Court of Sessions, or a criminal jurisdiction in a court of the county; or they are tried in a branch of the Supreme Court sometimes bearing the old-fashioned name "Oyer and Terminer."

#### TERRITORIAL COURTS.

When new territory, of immense extent, became acquired by the general government and began to be settled by a rapidly increasing population, which at first had not capacity or resources for creating a distinct set of courts for local affairs, the responsibility of providing such fell upon Congress. A system has been created\* in which the distinction of national and state authority

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\* Rev. Stat. § 1907. It does not apply to Arizona, or to the unorganized territories (Alaska and Indian Territory).



is not prominently marked. A territorial judiciary comprises a Supreme Court, District courts, Probate courts, and justices of the peace. Their powers are conferred by Congress, which also determines the extent to which their action may be directed by territorial legislatures. Therefore, they are not in any sense "State courts," nor are they, in the strict use of the term, "courts of the United States."

#### ENGLISH COURTS.

The scope of this work does not embrace English topics, yet American courts have been so much modelled upon those of England, that a mention of the recent and radical revolution at Westminster Hall is not inappropriate. Most readers of history know something of the existence, during Norman times, in England, of the great royal court of general authority throughout the kingdom, the *Aula Regis*. In the origin, quite likely there was no difference in meaning between "court" used of the king and his family and suite, and used of a tribunal to administer the laws. The king was anciently the fountain and dispenser of justice; and nothing could be more natural than that subjects aggrieved by misconduct of powerful barons, or complaining of each other's shortcomings or misconduct, should speak of "going to court" for redress, when they travelled to seek an audience of the king to ask his interference. When, in course of time, the king delegated the power of hearing controversies to a tribunal, this, as well as the royal household, continued to be called a "court." This judicial court, at first travelling with the king, was, in later years, established in permanent quarters at Westminster. As business for it increased, it was, by successive divisions of its authority, expanded into four tribunals—the Court of Exchequer, the Common Pleas, the King's Bench, and the Chancery. These are the courts so long famous in history and American law as the courts of Westminster Hall. The substance of their decisions was adopted by our grandfathers as

forming an acceptable body of common law for the colonies; and throughout our fathers' days, and ours, American jurists have respected and cited these tribunals as among their chief advisers on open questions in the law.

Is it as familiarly known that these noted courts no longer exist? The English people have gone back to the Norman ideal of one great court for the kingdom. Under a series of recent acts of Parliament, the Chancery, the King's Bench, Common Pleas, and Exchequer; the Admiralty, almost as ancient; the more modern Divorce Court, where Sir Cresswell Cresswell developed so many romances of private life; the Court of Probate, and others, have been merged in one Supreme Court of Judicature in England.

It is as if the asteroids should be welded together again into a planet!

This Supreme Court of Judicature exists in two branches—the High Court of Justice and the Court of Appeal. The first of these entertains suits when they are first brought; and in its halls are heard the ordinary jury trials. Here, also, the shades of the departed courts reappear, for the divisions of this court correspond in names and general character quite closely with courts of old times. Thus the Queen's Bench division resembles the old Court of Queen's Bench. Yet the change involves substantial results. Jurymen are summoned for the High Court of Justice, and not for either one division. No longer can a suitor having just cause be turned out of court because he has sued in a wrong tribunal; all suits are brought in the High Court of Justice. And pressure of business in one division may be relieved by a transfer of some of its causes to another.

The Court of Appeal has received, speaking generally, the powers which the old courts possessed to review decisions. It hears appeals from either division of the High Court of Justice. Its decisions are subject to revision in the House of Lords, much as the decisions of the old courts used to be.



Twenty-two judges were soon found necessary for the new organization. The salaries of the highest in office are: Lord Chancellor, £10,000; Lord Chief-justice of England, £8000. Those of the chief-justices of the Exchequer, the Common Pleas, and the Chancery are stated as £7000, and those of the barons in the Court of Appeal as £6000. The salary of an ordinary puisne judge is £5000. What perquisites or income from other positions are also available to the incumbents is another matter. Measured by American standards, the services of individual judges in England are liberally compensated. The privileges of an English judge also exceed those common in this country, in the feature of allowing clerical aid. The three superior law judges have each a secretary, salary £500; a principal clerk, salary £400; and a junior clerk, salary £200. The other judges are each allowed a principal and a junior clerk, but no secretary.

A recent writer for the New York press has, however, put forth a computation indicating American expenditure for judicial services to be, in the aggregate, larger than English. From the details given, it appears that the judicial business of England and Wales is discharged by thirty-four judges, paid in the aggregate less than a million dollars, the population served being about twenty-five millions; while New York State alone, taken as a sample of American methods, employs more than four hundred and fifty judicial officers, at an aggregate compensation of more than a million dollars, to administer justice among only five millions of persons. "Expense per capita in the kingdom, less than four cents; expense per capita in the State, over twenty cents. Justice five times as dear in this free commonwealth as it is in the monarchical and aristocratic kingdom!"\*

A minor feature of the revolution at Westminster Hall is that the old-fashioned styles and distinctions of attorneys, solicitors,

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\* From an article in the *New York Graphic*, which may be found in 12 West. Jur., 623.

and proctors have been abrogated. All these are now admitted to practice by the title Solicitor of the Supreme Court.

The acts of Parliament introducing these changes have also established rules of jurisprudence to govern the decision of causes. In particular, they have adopted unreservedly the principle introduced in New York in 1848, and copied into the legislation of more than half of the States, of a complete fusion of law and equity. More than this, they have imposed upon the law courts the duty of following, in several of the most important fields of jurisprudence, the liberal principles of equity and of admiralty.

## CHAPTER III.

## THE AMERICAN LIBRARY OF LAW.

IMAGINE that we see arranged before us the printed books which comprise the law as it has grown throughout the United States during the century, a collection such as many societies and some few individual lawyers have really made: only the actual libraries include numerous English and some Continental works, while our imaginary shelves contain works of American origin only. The volumes number nearly four thousand. And they are, as a mass, the product of a century; indeed, by far the greater part have been issued within fifty years. There exist a few volumes of decisions rendered previous to the Revolution; but, generally, the books have been published since, though the decisions were rendered before. There are rare old volumes of colonial statutes published in colonial days; but they have been elevated to the rank of curiosities or reduced to the level of paper-stock by repeals or revisions of the laws. With trivial exceptions, the whole American library of law is the growth and fruit of the nineteenth century.

## NUMBER AND NATURE OF THE REPORTS.

First in practical importance come the Reports. They now number, excluding mere curiosities and trivialities, second editions, magazines, and the like, about 3000 volumes. Of these the United States courts have contributed about 260 volumes; the residue are the product of the labors of the State courts. There is great disparity in the number from the different States. Thus, among the older States, New York and Pennsylvania have produced (at the close of 1879) about 450 and 200 volumes

respectively; New Jersey, 70; Delaware, 10; Rhode Island, 11. Among the States most recently organized California exhibits 51 volumes; Minnesota, 23; Kansas, 20; Nevada, 13; Nebraska, 8. Several of the Territories have commenced series of Reports.

These Reports are an extended official record of what the courts have decided in the various controversies brought before them. A distinguishing, fundamental principle of Anglo-Saxon jurisprudence has always been that each decision of a lawsuit shall form the rule for deciding any subsequent one involving the same questions and presenting the same aspects. The medical maxim *Similia similibus curantur* might well be translated, as an underlying rule of the common law, "Like cases are to be treated by similar decisions." This is not a necessary rule to jurisprudence, and has not prevailed in all systems. Other guiding principles are known, but have not been preferred by communities of Anglo-Saxon origin. For example, the sense of right, the judgment of expediency, or the mere will of the magistrate for the time being, uncontrolled by past action of his predecessors, might be the rule of decision. The accounts we have of ancient administration of justice and of Asiatic systems show that this method has been widely employed, and how untrustworthy it is; yet the stories of Solomon's judgments and of decisions of Haroun al Raschid indicate that under an exceptionally wise and pure magistracy such an administration of justice might not be unsatisfactory to a people of simple affairs and habits. For another example, a permanent legislative rule might be applied anew, from day to day, each judge considering only the written rule and its proper application to the cause before him, without paying regard to how it had been previously applied. The Ten Commandments have been a governing rule of conduct among millions of persons for threescore centuries without any notable accumulation of "reports" of decisions, because the habit has been to apply the commandment to the



question or case in judgment as seemed to be right at the time, without inquiry for past cases of like kind. This is understood to be the genius of the Roman civil law, so far that in countries where that or modern modifications of it prevail there is less disposition to follow precedents, and consequently less accumulation of them than under the common law. Obedience to precedents has been the backbone of that system. It is the fixed habit and the nearly obligatory rule that past decisions shall be followed, unless special reason for departing from them can be shown; such as evident error, or an intervention of a subsequent statute. And in this country, where numerous independent jurisdictions exist, and the courts of one are not in strictness bound to follow the decisions of another, they yet do so, to a great extent, voluntarily, as matter of comity or from a sense of expediency.

Upon this plan of following precedents, a full and reliable record of whatever has been decided in past cases is of paramount importance. The lawyer's first inquiry is for a "case in point," "an authority," "a precedent." To present the decisions of past controversies in such a manner that their doctrines may be applied to new ones is the function of the Reports. Happy is the counsellor, consulted upon a knotty case, who can find in the Reports of a court having authority a former decision which "runs on all fours," as the court-room phrase is, with the cause he is employed to present.

#### SPECIMEN OF A "LAW REPORT."

The narratives which the reporters give are elaborate. A Report in the full form presents, 1. A title, or the distinguishing name of the case; 2. A syllabus, or brief enunciation of the rule decided; 3. A narrative of the facts; 4. A condensation of the arguments of the lawyers; and, 5. The opinions of the judges. One or more of these characteristic features may, however, be absent. The following specimen (selected at random!),

will serve to show how they appear, and also to confute those who say that the law and lawyers are destitute of humor in professional work.\* The case, as a newspaper-man might relate it, was as follows: Lewis was arrested and put in jail on a charge of burglary; but before trial he broke out. He was then arrested and imprisoned on a charge of breaking jail. The trial for burglary resulted in an acquittal; but, instead of setting him at liberty, the authorities detained him for trial for his escape, and he was convicted of that and sentenced to two years' imprisonment. The court decided that this was right; even if innocent of the burglary, Lewis was bound, as a good citizen, to remain in jail and await a regular trial.

The form and order of a "law report" of this decision stand thus:

IN THE SUPREME COURT, STATE OF KANSAS.

GEORGE LEWIS, APPELLANT, *ads.* THE STATE OF KANSAS, APPELLEE.

*Appeal from Atchison County.*

SYLLABUS:

*Law—Paw; Guilt—Wilt.* When upon thy frame the law—places its majestic paw—though in innocence or guilt—thou art then required to wilt.

*Statement of Case by Reporter:*

This defendant, while at large,  
Was arrested on a charge  
Of burglarious intent,  
And direct to jail he went.  
But he somehow felt misused,  
And through prison walls he oozed,  
And in some unheard-of shape  
He effected his escape.

Mark you now: Again the law  
On defendant placed its paw,

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\* *State v. Lewis*, 19 *Kan.* 266.

Like a hand of iron mail,  
And resocked him into jail—  
Which said jail, while so corralled,  
He by sockage-tenure held.

Then the court met, and they tried  
LEWIS up and down each side,  
On the good old-fashioned plan;  
But the jury cleared the man.

Now, *you* think that this strange case  
Ends at just about this place.  
*Nay, not so.* Again the law  
On defendant placed its paw—  
This time takes him round the cape  
For effecting an escape;  
He, unable to give bail,  
Goes reluctantly to jail.

LEWIS, tried for this last act,  
Makes a special plea of fact:  
“Wrongly did they me arrest,  
As my trial did attest,  
And while rightfully at large,  
Taken on a wrongful charge,  
I took back from them what they  
From me wrongly took away.”

When this special plea was heard,  
Thereupon THE STATE demurred.

The defendant then was pained  
When the court was heard to say,  
In a cold impassive way,  
“The demurrer is sustained.”

Back to jail did LEWIS go,  
But as liberty was dear,  
He appeals, and now is here  
To reverse the judge below.  
The opinion will contain  
All the statements that remain.

*Argument, and Brief of Appellant:*

As a matter, sir, of fact,  
 Who was injured by our act,  
 Any property or man?  
 Point it out, sir, if you can.

Can you seize us when at large  
 On a baseless, trumped-up charge;  
 And if we escape, then say  
 It is *crime* to get away,  
 When we rightfully regained  
 What was wrongfully obtained?

Please the court, sir, what is crime?  
 What is right, and what is wrong?  
 Is our freedom but a song,  
 Or the subject of a rhyme?

*Argument, and Brief of Attorney for The State:*

When THE STATE, that is to say,  
 We, take liberty away;  
 When the padlock and the hasp  
 Leaves one helpless in our grasp,  
 It's unlawful then that he  
 Even *dreams* of liberty—  
 Wicked dreams that may in time  
 Grow and ripen into *crime*—  
 Crime of dark and damning shape;  
 Then, if he perchance escape,  
 Evermore remorse will roll  
 O'er his shattered, sin-sick soul.

Please the court, sir, how can we  
 Manage people who get free?

*Reply of Appellant:*

Please the court, sir, if it's *sin*,  
 Where does *turpitude* begin?



*Opinion of the Court. PER CURIAM:*

We—don't—make—law. We are bound  
To interpret it as found.

The defendant broke away;  
When arrested, he should stay.

This appeal can't be maintained,  
For the record does not show  
Error in the court below,  
And we nothing can infer;  
Let the judgment be sustained:  
All the justices concur.

*[Note by the Reporter:]*

Of the sheriff, rise and sing,  
"Glory to our earthly king!"

## THE ANNUAL PRODUCT.

The annual product of the Reports, in recent years, from all the courts within the country has reached about one hundred volumes. There is not, indeed, any possibility of stating a precise number, as ways of counting would differ. Some books contain duplicates of cases reported in others. Some books contain other matter along with law reports. If the question were as to the total product of the judicial labor and thought of one year, one would state the number of volumes at somewhat less than a hundred. If it were what number must a library purchase in order to keep fully up with the course of decision, the answer would be put at above the hundred.

As respects the United States courts, there is a regular, comprehensive, reliable series of Reports of the Supreme Court at Washington, from its organization, by successive reporters appointed by the court and paid by a Congressional appropriation in addition to some remuneration from sales of copies, and whose duties have been ably discharged. The country has good

reason to be satisfied with the Supreme Court Reports as a whole. While the court sat in Philadelphia it was not independently chronicled. But from 1801, about the time of the removal to Washington, a continuous, independent series has been conducted by William Cranch, also a judge and reporter of the Circuit Court of the District; Henry Wheaton, also noted as a publicist and writer on international law, and whose reports embraced so many great constitutional cases, decisions of Marshall and Story, and arguments of Webster and the earlier giants of the bar, and were enriched with so many valuable annotations that they attained high repute; and by Messrs. Peters, Howard, Black (also Attorney-general), and Wallace; which brings the list down to the series now current. And if any one finds the originals too voluminous and costly, there is a convenient and trustworthy condensation of them. In the lower Federal courts the system of reporting is desultory; publication depends on either the patronage of the bar or extraordinary public spirit of judges or publishers, and has not been punctual or uniform. It is to be regretted that government does not arrange some system of reporting the Circuit and District courts which would, on the one hand, restrict the voluminous narrations of superseded, reversed, and valueless cases which abound in some of the series as now published, and, on the other, would maintain a reasonable record of judicial action in regions which cannot sustain reports by the purchases of the bar. As respects the States, some of them employ and pay official reporters, others leave the publication of decisions to private enterprise. By these two methods the routine of publishing all, or nearly all, the decisions of the Supreme Court, or highest court otherwise named, has been for the past generation steadily continued. It was much interrupted during the civil war; but the arrears have been generally made good. There is a general improvement in punctuality noticeable within the past ten years. Quality and value do not seem to improve; the tendency to report every decision strengthens; and cases

which are mere repetitions, or only apply familiar rules to circumstances of improbable recurrence, multiply, rendering the books less instructive to the bar. If the object of reports is to hold the bench to a strict responsibility, to impress on the mind of every judge a sense of acting under scrutiny, of course every decision should be published, the questionable ones especially. If the object is to instruct the bar in the progress of jurisprudence, there should be a severer selection. The tendency of legislation and usage, particularly throughout the West, indicates that wholesome publicity of judicial action is a principal object.

#### THE STATUTE-BOOKS.

Next in order of practical importance and use are the books of Statutes; theoretic considerations might rank them above the Reports. These are, primarily, the publication of the new laws, of the acts of Congress or of any State legislature; not the bills and amendments as considered, nor the debates and votes, but only the laws as finally passed. These are usually issued soon after the adjournment of each legislative session. The number of volumes to which this department of law literature has attained does not admit of any precise statement, for several reasons; one, because in many instances the work of each distinct session is given in a separate pamphlet, hardly worthy in size to be counted as a volume; another, because the same law is often produced again and again in successive revisions and enactments. For no sooner have ten or a dozen pamphlets or volumes of "session laws" accumulated than some compiler assumes "to discharge the debt which every lawyer owes to his profession," by editing their contents systematically in a new volume; or perhaps the legislature authorizes all former statutes to be arranged and republished in one book of Revised Statutes or Compiled Laws, or some similar title. The various ways in which this is done are explained in the opening section of chapter xxi.: *Codification*.



## THE DIGESTS, TREATISES, AND PERIODICALS.

The Statutes and the Reports are the original and authoritative sources of the law; but the student's difficulty in grappling with so many volumes has given rise to the production of many digests, or indexes, and treatises, each devoted to a certain subject, sphere, or field, and designed to give to the lawyer, in a brief, convenient form, the rules derived from the Reports or Statutes. The preparation of treatises has enlisted the best efforts of many of the ablest and most experienced of American lawyers and judges. And noted American treatises—Greenleaf on Evidence, Kent's Commentaries on American Law, several of Judge Story's volumes, Wheaton's famous Treatise on International Law, and works of Angell, Bouvier, Cooley, Curtis, Dr. Lieber, Judge Redfield, Theodore Sedgwick, Francis Wharton—have been approved and accepted abroad, some of them having received the honor of republication, and even of translation.

There are, moreover, about thirty periodicals which may be deemed devoted to jurisprudence as their specialty, and which have attained general circulation. Among these the *Albany Law Journal*, *American Law Review*, *American Law Register*, *Central Law Journal*, *Chicago Legal News*, *The Reporter*, *Internal Revenue Record*, *Legal Intelligencer*, *Northwestern Reporter*, *Pacific Coast Law Journal*, *Southern Law Journal*, *Southern Law Review*, *Virginia Law Journal*, *Weekly Digest*, and *Western Jurist* have acquired, and still maintain, celebrity and influence.

## "CONSULTING THE BOOKS."

The occasions for consulting these three or four thousand books do not, upon the whole, diminish. Upon the one hand, it is true that there is, at the present day, less subordination to precedent, merely as such, than in early years. Courts are not as much swayed by a sense that they must obey any and every decided case. But, on the other hand, the extent, variety, and



complexity of the questions brought before the courts increase steadily—faster, of course, than the learning, mental power, and vigor of will of individual judges. Hence there is growing inclination to be advised by past decisions; enlarged necessity for the judge to take time for learning all that is known affecting the cause before him; more hesitation to decide a question until what has been adjudicated upon it has been reviewed. No expedients seem to dispense with the labor of research among the Reports and Statutes themselves. Authors and publishers, indeed, have proffered compilations of various kinds as substitutes for the original books; but the working lawyers have generally preferred to employ them as a means by which they might prosecute research among the Reports and Statutes themselves more rapidly, and carry it further, and have valued each compilation in proportion as it fulfilled this end. Codes have been enacted in the hope of superseding, by concise, authoritative rules, the undigested discussions of the Reports. Codes are useful; but immediately relieving the lawyer of his library has not been their strong point. The books deemed necessary to explain the code sometimes seem to outnumber those which the code assumes to consolidate, besides arousing new zeal for research in the older books to find the origin and materials of the new enactment. Lapse of time does not assist, for the books which grow obsolete with the advance of civilization are not as many as those to which each new year gives birth. The necessity, real or imaginary, of “consulting the books” is a large and growing element in the professional labor of the industrious, painstaking lawyer. He must—or considers that he must—examine, read in, perhaps quote from, two or three hundred of the three or four thousand volumes in the collection before him, to prepare himself for a single argument; and this adds a serious and wearying physical task to the mental duty. In the morning, when strength is fresh and interest awake, the books come down easily and pleasantly enough. But at night, when the brief has been written and a

hundred or so of volumes are strewed upon the tables and chairs, then one does wish that book-covers were fitted with springs and muscles like wings of birds, and that one could clap his hands and frighten the whole bevy to fly up to their perches on the lofty shelves.

THE "AMERICAN DECISIONS" AND "AMERICAN REPORTS."

These are the titles of two undertakings which will result in a reconstruction, for general convenience, of the heterogeneous mass of the State reports. The "American Reports" was first commenced, dating from 1869. It is a New York plan. It aims at selecting and presenting in one series all cases of general value decided by the courts of last resort in every State, unencumbered by cases of local law, and enriched with annotations aiding their general use. It has now reached nearly thirty volumes, in which are embodied the cases of general application gathered from five or six hundred of the original reports. Its success led to the complementary undertaking known as the "American Decisions." This is a California enterprise. Commencing with the earliest State reports, it is giving, anew, all the cases deemed useful at the present day and to the country at large, with annotations. It is drawing towards its twentieth volume, and bids fair, within the compass of about seventy-five volumes, to represent, usefully, the entire mass of State reports prior to 1869.

## CHAPTER IV.

## COLONIAL JURISPRUDENCE.

It may not be unwelcome to give a brief picture of American jurisprudence at the outset of its independent development. Let us ask what was the general condition of the law immediately before the time when the newly created Congress and recently emancipated legislatures, with the courts, entered upon the duty of expanding and moulding its rules to meet the rapidly advancing wants of the growing people. It is worth while to understand distinctly that the great fundamental principles underlying both the rules and the methods of jurisprudence were recognized and obeyed then, substantially as they now are. In government there has been an adoption of a new foundation. In law the changes made have been modifications and expansions of old principles and methods, rather than discoveries which can be called new. There has been a great advance; but it has consisted in the steady, progressive application of the law to the new rights and relations, the new ideas and possessions, which the growth of the country has developed.

Throughout later colonial times it was understood that the administration of justice in the courts between individuals was guided by the general laws and usages of England. This was not because every act of Parliament or decision of the courts of Westminster Hall was inherently in force in the colonies, but because English law had come, in point of fact, to be, speaking generally, the law here; partly by enactments expressly mentioning the colonies, partly by a voluntary adoption of portions of English law as being convenient, and still more because the American courts, even when acting independently, had very gen-



erally, as was natural, pursued the practice and followed the course of decision of English tribunals. The religious views which permeated the earliest legislation of our ancestors antagonized it strongly, in many points, to that of England; but these differences became greatly ameliorated during the first hundred years, so that by 1750-1775 the tone of legislation and of judicial decision had become much more in harmony with that of the mother country than was that of 1650. Upon questions of politics and statesmanship there was a growing divergence. But the general law of personal rights and relations, of property, of business obligations and liabilities, and of penal justice was, so far as controversies affecting individuals were concerned, very much the same in the two countries. The American colonies of English origin possessed a common law, composed of the English common law and statutes, and deducible from the reported decisions and authoritative text-books of English law, but varied in many of its applications to suit the circumstances or views of the American people. This has continued the basis of the jurisprudence of these communities since they have ripened into states. The Revolution, which repudiated the Crown and Parliament as the source of sovereign authority in the State, and accorded all allegiance to the people as the ultimate authors of civil government, did not repudiate or materially change the principles or methods of the law. Jurisprudence remains, in nature and essential principles, substantially unchanged. The great contrast is between the early and the modern applications.\*

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\* There is, perhaps, less necessity for an elaborate sketch of the condition of the law a century ago, because Blackstone's Commentaries—a book which has had a wider circulation, probably, than any other in the law, and has been read by many besides lawyers—together with many American writings on colonial and Revolutionary history, have given wide-spread general impressions as to the character and leading features of our early law. The publication of the Commentaries in their corrected and completed form took place between 1765 and 1769, less than ten years before the Declara-



There has been great advance in protecting the liberty of the individual against ecclesiastical dictation or tyranny of government. What is most valuable in modern American ideas of religious and civil liberty has been developed during the century. The general principles upon which one may have redress in the courts for a personal injury from his neighbor were recognized before the Revolution substantially as now.

So far as family and domestic relationships remain in fact unchanged, they have the same protection of law now as then. But views and usages as to these relations have changed. There were then recognized menial or domestic servants, apprentices, laborers, and agents employed in various capacities in the vocations then exercised, and the law subjected them to a limited authority on the master's part, gave them a remedy for wages, and held the master to a certain liability for their acts. The growth of business has greatly increased the complexity and variety of these relations, and the applications of old principles to them have been correspondingly modified. There is great apparent change as to marriage: it consists in this, that the views and customs of the people in respect to the authority of a husband over his wife and her property and affairs have changed, and the administration of law has followed—at a respectful distance—the popular progress. The general view of what control is expedient to be allowed to a parent over a child, or to a guardian over a ward, has changed but little; and, accordingly, the administration of the law on that subject is, in its general features, the same as of old.

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tion. At that period our ancestors in the colonies were following, as far as private rights were concerned, the previous acts of Parliament and the English common law; with exceptions, indeed, but in such degree that Blackstone's account is, as to most topics, a good general picture of the administration of justice between individuals immediately before the Revolution. This is a distinct field from civil or religious government in the colonies, which cannot be learned from the Commentaries.

Corporations were known to the law of a century ago in their nature, and in a few of the many uses for which, at the present day, they are so freely created: but that multitude of incorporated companies with which the whole country is now populous were, in 1776, unknown; not so much because the law did not permit them, as because the business of the people did not demand them. They had been found convenient for receiving and managing permanent accumulations of property for purposes of government, instruction, religion, or charity; the business enterprises—such as banking, insurance, manufactures, railroads, telegraphs—for which mammoth accumulations of capital are now deemed necessary, were then either in feeble infancy or unborn. The change has been primarily in the expansion of practical activity and endeavor; the legal change is secondary, and consists in applying principles long recognized to novel facts.

Land was recognized as property, and, as fast as the wilderness was reclaimed, our ancestors—except for the repudiation of the feudal idea that land was allotted to its possessor as a reward for his military services to his sovereign, and should therefore at his death descend undivided to his eldest son—employed the leading rules of the law of England to protect the possession of real property and regulate its transfer. But how limited must have been the scope of this branch of jurisprudence before immigration had rendered land valuable, before surveyors had mapped the general surface to render it divisible, and while only a few seaboard cities, inland towns, and limited agricultural regions spotted what otherwise was, so far as practical possession and enjoyment were involved, a wilderness! A simpler system of rules answered all the wants of landowners in the colonies than that which had grown up in England. Upon the other hand, when, in course of events, the United States became a purchaser, from European powers or Indian occupants, of vast tracts of unsettled domain, and engaged in the business of di-

viding these for sale and settlement, a duty was thrown upon the courts of administering the familiar principles of real-property law, and the regulations of government, in such a way as to bring this new system of disposal of public lands into convenient operation.

Contracts were enforced, or breaches of them redressed, by courts of justice upon substantially the same general principles of what is right between man and man as now prevail; but how few were the occasions for judicial interference compared with what we now witness! How could there be any law of railway traffic, or of express or telegraph business, when there were no railroads, expresses, or telegraphs? Probably the major part of business transactions of the present day giving rise to questions and controversies are of kinds essentially unknown a century ago. In this portion of the domain of the law, it is again seen that while there is great apparent increase, it consists chiefly in a progressive adaptation of old principles to what is new in human affairs.

What may be said as to the law of crimes? The English law, as in force throughout the colonies, generally recognized and punished as crimes some things which have now ceased to be so regarded. Absences from church, apostasy, and heresy were punishable. Witchcraft, prophesying, divination, and sorcery in various forms were dealt with as crimes, upon the theory, now obsolete among jurists, that it was possible truth could be ascertained or real effects produced by human employment of supernatural or necromantic means; and so of "multiplying the precious metals." But these views had diminished in energy before the era of the Revolution. English laws, presumably in force in some of the colonies, punished some practices as being infringements of sound, honest trading which now pass unchallenged by any legal penalties — such as "engrossing," or the buying quantities of provisions by a speculator to enhance the market price; "forestalling," or hindering merchandise upon its way to



market; and "regrating," or buying provisions within a market with intent to sell them within the same. So of exercising a trade without having served due apprenticeship. Assembling in numbers to petition Parliament was deemed in England to deserve criminal penalty; and a great variety of acts indirectly prejudicial to the stability of government were construed to come within the offence of treason. And, besides matters which old English law may have made criminal, many semi-religious regulations were prescribed by provincial laws, founded upon a theory that civil government should punish disobedience to the laws of Moses.

The administration of the criminal law was severe in those days as compared with ours. Punishments were graver, the punishment of death being imposed for almost any of the principal offences, instead of being reserved for two or three, the most heinous. The attitude of government towards those accused of crime was arbitrary and positive. The proceedings in criminal cases were strict, and the accused, if convicted, had no appeal. The custody of prisoners was little regulated for their comfort or welfare. But accused persons enjoyed, by adoption from England, the privileges of the writ of *habeas corpus* as a protection against unauthorized or pretended imprisonments, and of trial by jury as a preventive of oppressive or forced convictions of crime. Some of the colonies also possessed important assurances of individual rights in a "Bill of Rights," embodying a distinct declaration of principles of liberty obligatory on government in every prosecution of an individual. The principles and means which were to operate towards an amelioration of the criminal law were in existence at the era of the Revolution. And the amelioration which has been accomplished is by no means confined to American communities or attributable to American ideas. It has been as clear and steady in England as among us.





## II.

### NATIONAL SUBJECTS.

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#### CHAPTER V.

#### CITIZENS.

##### VARIOUS MEANINGS OF THE WORD.

Books of twenty and thirty years ago spoke of "citizens" as if they were a limited class of persons to whom the law gave special and peculiar privileges. Law treatises and dictionaries gave as a definition of the word citizen "one who has a right to vote for public officers and is qualified to hold office." Of course, then, the citizen must be adult, white, and male. Formerly such a definition was, perhaps, not amiss. At the present day a very different view prevails. The idea of citizenship is now extended to that of membership in the State or nation, including the right to its protection and the obligation to aid in its support; and the class of persons included is enlarged to embrace all natives and all foreigners who have accepted naturalization. This is the general sense of the expression "an American citizen." There are peculiar uses of the word, which may not be incorrect, as when, speaking of a particular man, one asks, "Is he a citizen or a soldier?" meaning Is he engaged in civil or military pursuits? or "Is he a citizen or a countryman?" meaning Does he live in city or country? or "Is he a citizen or an alien?" meaning Is he a member of our body politic or of some other na-

tion?\*" There is curious learning about the citizenship of children born abroad or in territory afterwards conquered by, or ceded to, our government; and about citizenship of corporations; and there are instances in which the context of a law or state-paper shows plainly that when citizens are mentioned, persons entitled to vote and hold office are intended. But the modernized meaning is "members of the body politic." This has been established chiefly by the constitutional rule known as the Fourteenth Amendment; but the antecedent history of the development of the idea is interesting.

#### THE EARLY SIGNIFICATION.

To say, as the dictionaries do, that "citizen" once meant a resident of a city has but little significance, unless one can realize the political character and functions of mediæval cities. This is not easy. Wall Street, in New York, is probably the only reminiscence in this country of times when there were walled cities; of a social condition when to group dwellings and environ them was useful as a means of protection against marauding violence of immediate neighbors. Yet the wall was once the type of the city's function, and the shelter of the people was a chief purpose of municipal organization. Membership of a city was then at once a privilege and a duty in a very different sense from ours. Imagine the infant Dutch-English settlement upon the toe of Manhattan Island to be actually relying upon the wall across the instep as a defence against roving and aggressive Indians on the north; and that those who are going forth to cultivate or build upon the lands beyond the wall do so with slender means of self-defence, but with a great reliance that if an attack comes they can return within the wall for shelter, or call upon the city for succor. It is plain that when this was the fundamental idea, membership in a city might be a highly valued

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\* Bates's Opinion on Citizenship, 10 *Op. Att.-gen.* 382, 388.

right, and that the answering duty to contribute to the city's means of defence might be assumed with a cheerfulness ripening into pride. Such sentiments were higher and more distinct in the case of European cities in the Middle Ages than they have ever been in this country. In days when the land at large was swayed by a feudal chieftain, attributing his right to past conquest as its source, and sustaining it by mere power; watching for opportunities to levy exactions upon his weaker neighbors, and enforcing them by aid of military retainers attached to him by rewards of lands, men of more peaceful traits—those who looked to agriculture, to commerce, or to the infant arts and trades for prosperity—gathered in cities and associated themselves largely for defence. A variety of persons might be found within a city's walls. There might be visitors or strangers receiving hospitality, but entitled to nothing; there might be imbeciles and paupers, destitute of right because they could not make contribution; there might be serfs or slaves; but those inhabitants who contributed to the city's protection, and were entitled to share in its benefits, were the citizens. They might prosecute their vocations or repose in their homes, understanding that each was pledged to secure the common defence; or they might go forth upon enterprises abroad, knowing that if they fell into oppression and peril the city would send for their rescue or demand redress for their wrongs. This reciprocal relation of allegiance and protection was the early idea. It varied with different varying circumstances of time and place. It attained such general growth that the free inhabitant or corporate member of a powerful and wealthy municipality enjoyed a *status* at home to which valuable power, influence, and privilege pertained; and received, while travelling abroad, a protection and respect accorded in view of his membership of the city whence he came, and proportioned to the rank and power of that city among the cities of the world. It is not possible to confine the modern meaning of citizenship within limits suggested by this its origin.



The whole social condition has changed. The city, founded on productive labor and exchange, has prevailed, and feudal rule has perished. Government is no longer a tyranny of an aristocracy, but an organization of the people for purposes which include the suppression of disorders and the security of rights. That spirit of productive labor which distinctively animated the antique city has overflowed the walls and spread over the land; the functions which related to defence have been chiefly transferred to the State or nation; and what is now called a city is a centre of denser population and increased activity, fixed by a commodious harbor or a convenient place for railroad transfers. History cannot circumscribe political ideas, and this recurrence to the origin of the phraseology must not be taken as imposing limitations upon its meaning. It serves to indicate the underlying thought, which is membership of the governing community; a relation of allegiance and protection between the individual and the sovereign mass; a condition which gives one who occupies it a title to recognition and care both while at home and when (rightfully) abroad, while it involves a reciprocal obligation of fealty and support. The full meaning is to be sought in the course of recent progress.

#### SUBJECTS AND CITIZENS.

In tracing this progress, the substitution of "citizen" in American forms for "subject" in European styles attracts attention. These are not two different relations, but opposite aspects of the same. They are the two sides of the shield: the obverse and reverse of the medal. If government is a sway founded on hereditary right and maintained by power compelling obedience, the individual is aptly described as a "subject," yet he has rights. If it is a co-operation for large public ends, he is best called a "citizen," yet he is not free from burdens. In citizenship, rights and privileges are prominently in view, duties are in the background. When a person is presented as a

subject of a sovereign, his allegiance is more noticeable, his franchise is less in sight. Membership of the nation is included in either case.

#### QUESTION OF CITIZENSHIP OF NEGROES.

Now, understanding that citizenship is membership of the sovereign mass considered as a privilege, we are prepared to review the constitutional change which has declared it to be independent of race. Prior to the war, the current of thought in the courts respecting negroes—the race whose *status* was most prominently in question—was that African blood was an insuperable disqualification; that a colored person, even though free, could not claim citizenship by birth, because the origin and usages of our institutions forbade it; nor by naturalization, because the laws on that subject embraced only “white persons.” That a free-born native negro was not a citizen was the position taken by the majority of the Supreme Court in the noted Dred Scott case. The decision was challenged and criticised by many respected authorities, but was approved and sustained by others, and was the general opinion of the judiciary at that time. But it grew steadily more and more unsatisfactory to the people at large. As the opinions of the courts determine only causes between suitors, and do not control the action of the political departments of the government, the general popular sentiment found official expression through the Attorney-general of the United States. The particular incident which elicited his decision was that the captain of the revenue-cutter *Tiger*, in the service of the Treasury Department, detained a schooner hailing from New Brunswick, and coasting past South Amboy, because her master was a colored man. The law of Congress authorizing issue of licenses to coasting vessels limited them to citizens of the United States. The point taken by the captain of the cutter was that the master of the schooner, being black, could not be a citizen (Dred Scott case), and therefore was incompe-

tent to receive a coasting license. The Secretary of the Treasury at the time was Salmon P. Chase. Every one knows that he would not sympathize with such an arrest. He, however, referred the question to the Attorney-general, Edward Bates, who advised that free men of color, native-born, were presumably citizens—that is, their color was not an incapacity or disqualification—and, therefore, that the schooner and her dark master should be allowed to proceed on the voyage.

Some of the positions of this able and elaborate opinion deserve condensed restatement at this day. The Attorney-general reasons thus:\*

There is no satisfactory definition of "a citizen of the United States." In most instances, the discussion has turned not upon the intrinsic qualities of citizenship, but upon the claim of some right or privilege erroneously supposed to inhere in citizenship; such as the right to hold office, or to vote. Neither of these constitutes or indicates citizenship. Eligibility to office may be, and is, conferred sometimes on aliens, and the right of suffrage is not extended to all citizens; women and minors, in particular, are excluded. These faculties of voting and holding office are made to depend on a variety of facts purely discretionary, such as age, sex, race, color, property, residence. No person in the United States did ever exercise the right of suffrage in virtue of the naked, unassisted fact of citizenship. In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on one side and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national, or of any other sense in which the word has been used in the Constitution, or can be used properly in the laws of the United States. The phrase "a citizen of the United States," without addition or qualification, means neither more nor less than a member of the nation.

Again: every person born in the country is, at the moment of birth, presumably a citizen, and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the 'natural-born' right, as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color,

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\* Bates's Opinion on Citizenship, 10 *Op. Att.-gen.* 382.



or any other accidental circumstance. That *nativity* furnishes the rule, both of duty and of right, as between the individual and the government is an historical and a political truth universally accepted. There is nothing in the Constitution or in the reason or nature of things which authorizes saying that any peculiarity of color or race overrides the fact of native birth. The supposition that it does arises from erroneous views of what is meant by the word as the Constitution employs it.

#### THE FOURTEENTH AMENDMENT.

This circumstance occurred late in the fall of 1862, towards the middle of the war. The course and events of the war, and the resulting emancipation of the slaves, increasing the number of free native-born blacks to nearly four millions, greatly heightened the importance and stimulated the popular purpose of protecting the negroes by national authority in their personal rights. The Thirteenth Amendment of the Constitution, which assured them of their freedom, left them subject to State laws restricting their rights and capacities on the ground of race and color. Hence the Fourteenth. It declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."\* And it forbids any State law which shall abridge the privileges or immunities of citizens of the United States; and imposes a reduction of its representation in Congress upon any State which (except for crime) shall deny suffrage to such citizens, being male inhabitants of the State, twenty-one years old. But it does not define citizenship, or declare, even by implication, what privileges or effects belong to it. On both these

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\* There is in our political system a government of each of the several States, and a government of the United States. Each is distinct from the others, and has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other.—United States v. Cruikshank, 92 U. S. 542.



points it is silent. The words "all persons born or naturalized . . . are citizens" have been sometimes taken as an exhaustive delineation of all the persons who are citizens, so that no person not included can be one. Yet this is not so. Before the amendment some few persons born out of the country and never naturalized were yet recognized as citizens—such as a child of a citizen father; a woman married to a citizen. The amendment was not designed to ostracize these, but to extend the privilege to the emancipated slaves. And, carefully read, it does not exclude any one. Saying that all persons native-born or naturalized are citizens does not necessarily mean that some others are not also. As it does not define the relation, so, also, it does not describe or enumerate its privileges; these are left to be ascertained.

#### CITIZENSHIP AND HOLDING LAND.

It is easy, moreover, to see that citizenship is distinct from ability to hold property. In England, from early times, aliens were under a prohibition to hold lands, and formerly this disability prevailed extensively in our country. Very little of the doctrine now remains. Twenty-seven of the States have abolished it, and enabled aliens (the laws of some say *resident* aliens) to own and convey lands like citizens. Nine more give this privilege to the alien from the time he makes a declaration of his intention to become a citizen. Pennsylvania has given the privilege in a limited extent; an alien may buy land if he does not buy too much. Vermont alone, in 1878, had not abolished the restriction. Her inactivity has apparently been due to the fact that there aliens do buy, hold, and sell lands by tacit consent. In Great Britain and Ireland the disability was, by an act of Parliament passed in 1870,\* removed in regard to property acquired within the United Kingdom and after the passage of the act. It declares that real and

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\* Stat. 33 and 34 Vict. ch. 14, § 2.

personal property may be acquired and disposed of by an alien, or transmitted through one, in the same manner as though he were a British subject. But these enabling laws have never been thought to involve citizenship; they do not affect the alien's condition as a member of the body politic. A similar doctrine is presented in a more salient manner in the case of the Virginia oysters. The Legislature of Virginia enacted that any person not a citizen of the State who should take or plant oysters in Virginia waters should forfeit \$500 and his boat. A citizen of Maryland planted oysters in Ware River, in Virginia, and was prosecuted. He contended that as a citizen of Maryland he was entitled in Virginia to all the privileges of Virginia's citizens, oyster-planting included. But the Supreme Court adjudged that oysters are not a privilege of citizenship, but a subject of private property. The State was the owner of the beds of all tide-waters in the State, and, as a consequence, was the owner of the oysters there growing. She could grant them and the privilege of cultivating them to whom she pleased, either by naming individuals or by a general designation, such as "citizens of Virginia." Only the persons to whom she gave the right could exercise it. The Maryland man had no more claim to take the oysters which the State had given to the citizens of Virginia than to cut grain growing on land belonging to the State, but granted to her citizens.\* Thus we see that citizenship and property are independent.

#### CITIZENSHIP AND SUFFRAGE.

What, then, is the connection between citizenship and suffrage? Briefly indicated, it is: 1. That the States have from early times been accustomed to limit suffrage to citizens; to require citizenship as one of the several qualifications of a voter, so that while not a quarter of all citizens (counting women and children) have

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\* *McCready v. Virginia*, 94 *U. S.* 391.

voted, the general rule has been that only citizens might vote. And, 2. That, by recent amendments to the Constitution, the suffrage previously accorded cannot be taken away from citizens on the ground of race, color, or previous servitude at all, nor denied to adult male citizens on other grounds (except for crime), without exposing the State so abridging the right to a proportionate diminution of her representation in Congress. To attempt an elaborate exposition of this topic would be passing from the domain of jurisprudence to that of statesmanship.

#### CITIZENSHIP AND HOLDING OFFICE.

Few words will be needed to show that, as suffrage is not an element in citizenship, so neither is eligibility to office. The designation of persons to serve the State is to be regarded far more as a question of ability and trustworthiness than as one of personal claims; and where there is, in American laws or institutions, one indication that office-holding has been regarded as a privilege of citizens as such, there are many that the sovereign power makes its own designation of the classes of persons from whom candidates may come, irrespective of any general right. To restrict the honors and rewards of office to any small privileged class is not American policy; but neither are they claimable by every member of the commonwealth. The State and the nation have each always prescribed such qualifications of age, sex, residence, learning, and pecuniary responsibility as the nature of duties to be performed has suggested. Citizenship is often prescribed as a condition; it is not the basis of a right. The intent and effect of a law that "white male citizens of full age shall be eligible" to specified offices is rather to exclude persons who are not members of the commonwealth than to recognize any right in all who are. The position may well be illustrated by a mention of Mrs. Bradwell's case, although what was there involved was admission to the bar, which is not an office in the fullest sense. Mrs. Bradwell asked, from the Su-



preme Court of Illinois, admission to practice as a lawyer. It was refused; and she sought redress from the Supreme Court of the United States, claiming that to pursue the law as a vocation was one of the privileges of a citizen. The judges denied her application,\* some saying that citizenship of the United States does not underlie the office of the lawyer in a State; others that citizenship of women does not forbid restricting that office to men. An application by Mrs. Lockwood, of the District of Columbia, to be admitted to the Court of Claims met substantially the same defeat. The subsequent legislation of Congress admitting women to the Federal courts does not contravene, but rather supports, the view that mere citizenship does not involve it.

#### CITIZENSHIP OF WOMEN AND CHILDREN.

No sooner was the declaration "all persons born within the United States are citizens" incorporated in the organic law than the advocates of woman suffrage claimed it as surely establishing their position. Habituated to the idea that suffrage is involved in citizenship, they considered that their great work was accomplished; the ballot had been given to woman by the same mandate that gave personal capacity to the freedman. Miss Anthony in New York, Mrs. Minor in Missouri, and Mrs. Spencer and Mrs. Webster in the District of Columbia stepped confidently to the polls and tendered their votes, and contended earnestly in the courts that the votes ought to have been received, because women had been made citizens. The Supreme Court explained† that these ladies, being white and native-born, had always been citizens. As used in the Constitution, the word conveys the idea of membership of the nation; nothing more. Women have always been citizens, the same as men.

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\* *Bradwell v. State*, 16 *Wall.* 130.

† *Minor v. Happersett*, 21 *Wall.* 162.



The amendment did not affect them except as it affected men. And it did not enlarge the privileges of a citizen. Suffrage was not, previously, one of these privileges, for the States always limited that right by considerations of age, sex, residence, and even tax-paying; and sometimes accorded it to aliens: it has not become one since.

It is worth noticing that the same argument which would win suffrage for women from the Amendment would win it for children. The Amendment says nothing of age; and the language of all the standard authorities on the subject is framed upon the understanding that the native takes his *status* from the time of birth. Any idea that an adolescent attains citizenship when he becomes "of age" is an error. There is not, indeed, any magic about the age of twenty-one which should change one's civil condition. A person becomes of age for different purposes at different years. At birth he is of age to receive full protection in rights of person and property. At seven years, he becomes of age to have capacity for crime proved against him; at fourteen, to have it presumed; also to have his consent asked and followed in changes of his domestic relations; at eighteen, to render military service; at twenty-one, to be independent of his father, and to vote; at twenty-five, thirty, and thirty-five, to become Representative, Senator, or President; and at forty-five, to claim exemption from the militia. And these are not all, nor are they invariable. They are rules of positive law, founded only in civil convenience, and one of them has no more relation to citizenship than another. The recent discussions have shown in a clear light that the American idea of citizenship is independent of sex and of age. Under the same enviroing conditions, men, women, and children share it alike.

#### EXPATRIATION AND NATURALIZATION.

There has been an important change in opinion upon the right to leave the land of one's birth and become a citizen of

another country. A doctrine that an individual must continue subject to his native allegiance until released by his sovereign was a legitimate consequence of the Old-World theories of government. But the American view, that governments derive their just powers from the consent of the governed, has always been thought to involve one's right to renounce natural allegiance and become a citizen of another country consenting. This question was long and earnestly controverted between Great Britain and the United States. One of the causes which led to the war of 1812 was the assertion of the right of British ships of war to inspect crews of American vessels on the high seas, and take out seamen of British birth, notwithstanding they had been naturalized in this country. The practical assertion of these claims has declined in modern times. In 1868 Congress passed a declaratory law\* asserting the right of expatriation as "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and repudiated all claims of foreign States to enforce allegiance of their subjects after naturalization. In 1870 a treaty was exchanged with Great Britain providing that British subjects naturalized here should be treated, for all purposes, by Great Britain as American citizens. And we have similar treaties with several other European governments. Then, by an act of Parliament passed in the same year,† Great Britain seems to have given the consent which she formerly withheld, to the expatriation of her subjects. It declares that any British subject voluntarily naturalized in any foreign State shall be deemed to have ceased to be a British subject, and will be regarded as an alien. He may, however, return and be readmitted to British nationality.

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\* Rev. Stat. § 1999.

† Stat. 33 and 34 Vict. ch. 14, § 6.

## THE MODERN SIGNIFICATION OF CITIZEN.

The American idea, then, regards the whole great mass of persons who are by birth, or have become by naturalization, members of the body politic as privileged in being citizens. As respects administration of internal affairs, this class embraces all who constitute the people of the State or nation, share the protection of either by right, and not from favor, and bear the cherished responsibilities of allegiance and support. The term excludes visitors, intruders, temporary residents, persons unwilling or not yet qualified to assume allegiance, and some others; and thus it may well be used to designate a condition of a grant of political power, or to limit the description of persons to whom the right to hold offices or lands, or the ballot, is accorded. But it does not include these rights, nor is it sufficient to confer them. As respects administration of matters abroad, citizens are those who, rendering allegiance to the government at home, are entitled to travel or reside abroad, in the national name, under the country's flag, protected by its treaties, aided by its diplomatic service, and succored, if necessity arises, by its forces. This thought has gained force and weight with the growth of the nation. Whatever has increased the prestige, influence, or power of the American name has enlarged the importance and value of American citizenship. Yet there is an aspect in which the idea grows vague in proportion as it expands. Already, under American institutions, citizenship in Boston, Albany, or San Francisco has no such salient, effective meaning as was attributed to it among cities in the Middle Ages. Citizenship in Massachusetts, New York, or California cannot signify so much under a constitution declaring equal rights in all the States as it may denote among independent cantons or principalities upon the continent of Europe. It is not like air, light, or water, which may be enjoyed by all if there is enough of it; but like rank, priority, or station, which vanish under the attempt to con-

fer them upon all. And as the advance of civilization, extending citizenship to more and more persons, and binding divers governments more and more firmly under compacts and constitutions securing to the citizen of anywhere his privileges everywhere, is seen to make the condition and privileges less and less distinct, so one seems to foresee that, in the remote future, citizenship may become merged and lost in the harmony of governments and the brotherhood of man.



## CHAPTER VI.

## CIVIL RIGHTS.

## WHAT ARE THE CIVIL RIGHTS LAWS?

THERE is quite a complex series of constitutional provisions and acts of Congress which are often mentioned as "the Civil Rights laws." "Civil rights" is an expression broader than "rights of citizens;" it includes those rights, privileges, and immunities which the law concedes to all orderly persons in the community, irrespective of distinctions of class or peculiar rights acquired by an individual. Several enactments became necessary, soon after the civil war, to secure these general rights of all mankind. Some of their provisions are of comparatively little general interest, such as those punishing interference with officers, and those providing special actions and remedies. Others, protecting the right to vote, and punishing interference with voters, have been explained and discussed in the political journals until they have been made familiar to all. There are three which are not generally understood, yet bear upon the ordinary business of the people, and on such establishments as hotels, saloons, theatres, cars, and steamboats. They are often mentioned. If a holder of a ticket to a concert or theatre is refused his seat on account of color, he threatens a Civil Rights action. If a colored man calls for refreshments at a saloon, and the proprietor refuses to serve him, he consults a lawyer about suing under the Civil Rights laws. At the South, two or three married couples have been prosecuted because, contrary to the law of the State, the husband was black and the wife white, and their lawyers have argued that such law amounted to nothing, because contrary to the Civil Rights laws. At the North, when

the Jews were excluded from Saratoga or Coney Island hotels, they were counselled that by virtue of the Civil Rights laws they could insist on being received. The Supreme Court has been engrossed by the question whether, since the Civil Rights laws, colored men may be left off the jury lists. The laws classed under the general term "Civil Rights laws" are three acts of Congress passed in 1866, 1870,\* and 1875.† The act of 1866 was the first general law of the kind, but there is an earlier trace of the principle. In 1863, the Alexandria and Washington Railroad Company, which then ran from Alexandria to the south side of the Potomac at Washington, became desirous to extend its line northwardly, so as to connect with the Baltimore and Ohio Railroad, and thus make a through line. Congress gave it leave to do so, and to go through Washington, upon condition that no person should be excluded from the cars on account of color. The company built the extension, and was accustomed to run two cars—one set apart for colored persons, the other for white. One day a colored lady passenger objected to this arrangement—purely upon principle, it seems, for the cars were alike comfortable—and persisted in going into the car for white persons. The conductor put her out, and she brought an action. The Supreme Court decided that Congress intended that there should not be any discrimination on account of color among the passengers. It was not enough that the company would carry different races in the same trains; they must be carried upon an equality.‡

It was about three years after this charter that the series of

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\*Rev. Stat. § 1977, 1978.

†Act of March 1, 1875, ch. 114, 18 *Stat. at L.* 336.

‡This decision (*Railroad Company v. Brown*, 17 *Wall.* 445) was founded on the language of the particular charter, and does not show that the general Civil Rights laws forbid carriers of passengers to assign separate cars or cabins to colored persons; and a later case (*Hall v. De Cuir*, 95 *U. S.* 485) held that the States cannot enact such a prohibition, and intimated that Congress had not yet done so.

general laws was commenced which embodies a general principle of equality in rights among persons of different races.

#### PROPERTY AND CONTRACTS OF COLORED PERSONS.

The acts of 1866 and 1870 declare that all persons within the United States shall have the same right, in every State and Territory, to make and enforce contracts, and buy, own, and sell property. This is understood to mean, not that a colored man can compel any one to employ him or sell to him who has no other objection than color, but merely that there shall not be, anywhere in the Union, any disability to own property or do business founded on color; that any one willing to deal with colored persons may do so without fear that the bargain can be declared null because one party was black. At the time when this principle was first enacted, the negroes had just been made free, but various State laws imposed extensive and serious disabilities upon them; and persons willing to deal with them could not safely do so if there was any State law to prevent the transactions being enforced. There might be, for example, a local law forbidding negroes to be employed upon public works, in which case a contractor was prevented from employing them even if he wished. The object of the Civil Rights law was to enable him to do as he pleased. If, says Congress, a white man and a colored man can agree upon a bargain, no State law shall forbid their making it merely because one of them is black. This is the extent of the rule; if they cannot agree, if a contractor does not wish to employ negroes, or if a manufacturer, ordinary merchant, or owner of property does not wish to sell to negroes, there is no compulsion. The case is much like that of minors and married women. A minor cannot bind himself by a contract; hence an employer who would willingly hire him may be hindered by the fear that the engagement cannot be enforced. By former laws a married woman was incompetent to buy or convey land; and thus persons who desired to deal with her



were prevented. When, however, any State repeals such laws, as, in respect to married women, most States have, then a man can deal or not, as he chooses. The change does not in any respect compel him. So the Civil Rights law, in its application to contracts, simply abrogates disabilities and imparts capacity. To suppose that it gives colored persons any preferential right to be employed, or to sell property, is an entire mistake. It does not force colored persons upon those who are averse to dealing with them. In all that great realm of business in which one is free to deal or not, as he pleases, he may refuse to do so, notwithstanding the Civil Rights law, merely for color. But there are some vocations in which one is not free to deal or refuse as he prefers, but must serve all who apply. These are mentioned in a later law.

#### MIXED MARRIAGES.

Marriages between whites and blacks have been the subject of conflicting laws and decisions since emancipation. Several of the States have explicitly forbidden them; within Georgia, North Carolina, and Virginia, for example, they are prohibited. In others they are, perhaps, reprobated by public opinion, yet not invalid in law if persons choose to form them.

The question has arisen whether these prohibitions are not abrogated by the Civil Rights laws; and one or two State courts have decided that they are; but others, and some national courts in which the question has arisen, have given a contrary opinion. The most perplexing form of this question is when persons wedded in a State where such a marriage is allowed are residing in one where it is forbidden. Two instances occurred in Virginia, recently, in which a colored man won the consent of a white woman to become his wife. Of course, when these Virginia residents sought counsel of the law of Virginia, the oracle forbade it. This opinion not being satisfactory, the candidates travelled into the District of Columbia, where no positive law forbids, and there celebrated their weddings; they then re-



turned to Virginia and began housekeeping. The result was that, at the instance of their displeased neighbors, they were cast into prison. One of the bridegrooms invoked relief from the State Court of Appeals. His counsel argued that a marriage which is valid by the law of the place where it is made is valid everywhere, and that Virginia must accept marriages made in the District of Columbia which were valid by the law there prevailing. But the court decided that this doctrine should not be applied to persons who were living in Virginia and went abroad to marry merely in order to evade the law at home.\* The other bridegroom asked relief from the United States Circuit Court. His counsel cited the Civil Rights laws of Congress, which give to colored persons the same right with whites to make contracts, and, after reading law-books to show that marriage is a civil contract, contended that a State law which forbids marriages between persons of the two races is void. But the court adjudged that the Civil Rights law about contracts means only contracts valid by the laws of the State where made, and that marriage is not a contract in that sense, but an institution of society subject only to State laws, and with which Congress has no power to meddle. Moreover, it was said, such a law does not bear unequally on black persons; it equally forbids either color to marry the other.† The question is now awaiting final decision in the Supreme Court at Washington. Similar cases have been decided in North Carolina. Her law forbids these mixed marriages. In two cases the courts have held that if persons have been married in another State where the law is different, without meaning to move to North Carolina, but, years afterwards, they do come there to live, they shall be allowed to be husband and wife; yet if two North Carolina residents go abroad to marry each other when they might not do so at home, and return, they may be prosecuted.

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\* *And. Kinney v. Com.*, 30 *Gratt.* 858.      † *Exp. Edm. Kinney*, 3 *Hugh.* 1.

## INNS, CONVEYANCES, AND THEATRES.

In 1875 a further law was passed which entitled all persons to the free and equal enjoyment of inns, public conveyances, theatres, and other places of public amusement. The theory of this law doubtless is that persons in the vocations named are not free to deal only with persons whom they may select, but must treat the general public alike; and it goes further than to remove disabilities—it declares a positive right. As respects inns, perhaps the higher courts will restrict this term somewhat. The old-fashioned legal idea of an inn was a house of entertainment on a line of public travel offering accommodations to all persons who applied and were ready to pay the charges. Landlords of such houses have always had rights and duties not attributed to all proprietors of establishments giving entertainment. The owner of a hotel for invalids visiting mineral springs, of a building let in lodgings without furnishing meals, or of a saloon supplying refreshments without giving lodgings, does not keep an inn, according to many of the decisions in the law-books. As to conveyances, they all now carry colored people; but some claim to assort the passengers in different cars or cabins. In Louisiana, the State passed a law to forbid this; but the United States Supreme Court said that was assuming to regulate commerce, which a State cannot do; if there is need of a law to forbid carriers from assorting their passengers according to color, it must come from Congress. As to theatres, the question whether Congress can regulate them has not yet been decided; but in a case prosecuted in Louisiana, under a State law precisely like the act of 1875, the colored man who had bought a ticket and was refused admission recovered \$300 damages.

## MIXED JURIES.

There is still another law of Congress\* which provides that when any person accused of crime in a State is denied, or cannot enforce, in the State tribunals any right secured to him by the Civil Rights laws, he may demand to have his trial removed into the United States Court. Under this law, and the general doctrine that negroes are to have equal rights with white persons, a claim has been made that when a colored person is upon trial negroes should not be systematically excluded, as in some places they have been, from the jury. This must not be mistaken for a claim that he is entitled to have them drawn as jurors. Such a claim would not be a novelty in jurisprudence. It was an early rule of English law that persons liable to serious prejudice on account of race, by reason of foreign birth, might demand to be tried by juries composed one half of the nationality of the accused; and statutes perpetuating this rule have existed in several of the States. An enactment giving to any negro culprit the right to ask that six negroes should be drawn to serve on the jury to try him would be only repeating a measure of protection against race prejudice which has been familiar for centuries. But no such enactment has been made by Congress. It would be more proper subject-matter for a State law. What has been demanded is that both classes shall be included in drawing jurors, so that there may be a fair chance that every culprit should have some of his own color and race to hear his defence. Examples may be found of this question in three recent cases which have excited wide interest. In one of them, Reynolds was arraigned before a State court of Virginia for the murder of a white man. By the jury law of Virginia all male citizens between twenty-one and sixty years of age who are entitled to vote and hold office under State laws are liable, with exceptions in favor of officers, to serve as jurors. But the selection of names for the jury list of each county is confided to the county judge. He designates

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\* Rev. Stat. § 641.



the inhabitants of the county whom he thinks well qualified for the duty, and from these the actual juries are formed. Hence the practice may vary in different counties as to whether colored men are drawn upon the juries or not. In Patrick County, where Reynolds was put on trial, colored men were uniformly excluded from the jury list. His counsel made seasonable and formal objection to this, but it was overruled. Reynolds was tried before a jury of twelve white men, selected from a list from which all negroes had been excluded, was convicted, and sentenced to imprisonment. Application was then made to Judge Rives, sitting in the United States Circuit Court, to order a removal of the cause to the Federal tribunals, on the ground that, under the Civil Rights legislation of Congress, Reynolds had the right to be tried by a United States court if the laws and courts of the State refused him the privilege of having any persons of his own race upon the jury. Judge Rives concurred in this opinion, and granted the application.

Another case, which also arose in Virginia, presented substantially the same question of right, but in a different aspect. Judge Coles, in impanelling a jury, pursued the same course as was taken in the Reynolds case—that of systematically and purposely excluding all negroes. But the lawyers for the accused, instead of applying to have the trial removed, instituted a criminal proceeding, under United States laws, against the judge for the misconduct of refusing to consider names of negroes.

Still another case arose in West Virginia. Taylor Strauder, a negro carpenter, coming home one night, thought he detected a white man sneaking from his premises. He charged his wife with infidelity; the pair quarrelled through the night, and, according to the testimony of a little daughter, Strauder finally struck and killed the wife. Arraigned for murder, his counsel demanded a removal of the trial to the United States Court. The jury law of West Virginia, at that date, excluded colored men from jury duty throughout the State; and this, they argued, deprived *their client* of that fair and impartial trial which the

United States law assures. Their application was denied. Strauder was tried and convicted; and on a review of the entire proceedings before the State Supreme Court, the validity of the State law and of the composition of the jury was sustained.

These three cases were argued in the Supreme Court at Washington. The decisions are understood to embody substantially these positions:\*

1. The Civil Rights laws do not require that every negro placed upon trial should actually have colored jurors; but they do require that juries shall be chosen without any special exclusion of colored men.

2. If the law of the State directs that all negroes shall be excluded from juries, it is void. If it does not direct this, but allows the officer who chooses the jurors to exclude negroes, and he does exclude them, this is no better; and the State law affords no protection to the officer.

3. If the terms of the State law, or the course pursued by the State officer, amount to a deliberate, complete exclusion of all persons belonging to the same race with the prisoner from the jury, he may have his trial removed to a United States court; but if they are such as to give a fair chance that such persons may be drawn, all is done which Congress has required, and the circumstance that no colored persons are, in fact, drawn gives no ground of complaint.

Accordingly, in the Strauder case, the decision is that the trial ought to have been removed, because, in this, colored jurors were absolutely excluded. In the Reynolds case, the court says that the trial should not have been removed, for the law did not exclude them; if they were excluded, it was by the course pursued in drawing the names. In the Coles case, the officer who abused the discretion reposed in him of selecting jurors by systematically refusing to receive competent persons merely because they were black is held subject to punishment under national law.

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\* The official reports are not yet published.

## CHAPTER VII.

### THE INDIANS.

FROM the first settlement of the country, the relations of the Indians\* to the whites, their rights, and the proper mode of treating and governing them have formed a question of the gravest difficulty. There has been, in past years, an impression that the native race was declining in numbers and destined to become extinct; and that the Indian question would gradually lose importance by the diminution of the red men.

#### NO IMPORTANT DECREASE.

Recent investigations have shaken faith in the decrease of the aborigines. Lo is now predicted to be, like Sambo, permanently a member of the American community. For centuries, very probably, his peculiarities and needs will require the government to maintain an "Indian policy."

Three considerations are urged against a belief in any rapid decrease. One is that our impressions as to the original number are probably exaggerated. No real knowledge exists. Neither government nor commerce, at the date of colonization, nor the ethnologic science of that day, preserved any statistics. There was no census, nothing like an enumeration. We possess only vague and general estimates, and they are intrinsically untrustworthy, coming from sources whose natural tendency would be

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\* It is matter of history that the discoverers of this continent in the fifteenth century applied the name Indians to the aboriginal inhabitants from the erroneous supposition that India had been reached. The name, retained in common use notwithstanding the error in which it originated, is equally established in the statutes and in legal usage to designate this race.



towards overstatement. Some of these estimates are from Indians; but an Indian brave, describing to white visitors the number of his tribe, would be likely to exaggerate. Some are from whites reporting to their own people the results of some contests with Indians; but warriors are prone to overrate the number of the enemy, for to magnify the opposing force enhances the glory of victory, mitigates the mortification of defeat. Some are from the Jesuit fathers, laboring as missionaries among the native tribes; but they might easily place the number needing their labors above the actual fact. Some are from adventurers on their return to Europe: such persons are always apt to swell the accounts of what they have seen and heard. Thus our idea of the ancient number of the Indians hangs upon the estimations of people whose interest and tendency were to estimate largely. Hence we may have well been led to overestimate the decrease.

The same point is reached by another road. If one should visit Saratoga in October, and find hotels and lodgings all full, he would know that the number of guests had not diminished much since July or August. Lieutenant-colonel Otis, who has written, recently, with fulness and candor upon this whole subject, reasons in a similar way about the Indians. He considers that the present number is about as many as could have subsisted in the country in aboriginal days. When the country was covered by the primeval forest, only parts of it were available for Indian support; only the streams which could be fished, and the traversable forests which sustained and sheltered game, could maintain fishing and hunting savages. He urges that the Indians living wild, and untaught in the arts which promote compact dwelling, require, on the average, about six thousand acres of the wilderness a-piece to support the game and fish required for their food in such quantity that what the Indians kill and eat yearly is replaced by natural increase. If twenty thousand in a tribe live by hunting the buffalo, for instance, they cannot subsist perma-

nently within less territory than will feed perhaps a herd of a hundred thousand; for when the young buffaloes of the year do not replace all losses, including that by hunting, food fails, and the tribe must move or perish. They have no game laws to preserve the game; no fish commissioner to restock exhausted waters. Taking the aggregate territory at about twenty-four hundred million acres, and the existing number of Indians at nearly four hundred thousand, he computes that nearly as many now live as could sustain themselves throughout the whole land if they were deprived of all support from the whites, and of all the whites have taught them, and remitted to aboriginal conditions and to a dependence on hunting and fishing as a chief subsistence. If the premises are sound, the inference is irresistible that there has not been much decrease.

A third consideration is that there are not now in operation any causes adequate to produce extinction. The wars from which the tribes now suffer are not wars of extermination. Pestilence and famine are so far counteracted by the resources of science and humanity that they are not probable causes of the destruction of a whole race. The Indian suffers much injustice and privation at the hands of the white man; but he receives liberal supplies from the white man's government, and thrives, rather than pines and dies, upon the support he receives. It is known, indeed, that single and noted tribes have waned and become extinct; but many hold their own in numbers, and some have actually increased. Thus there is no reason to say that the Indian question will lose interest or importance by the extinction of the race.

#### TRIBES AND TREATIES.

In early days the government dealt with the Indians chiefly as tribes. This theory was not built; it grew. The colonial forefathers did not make their scattered, feeble settlements on the Atlantic coast under circumstances which favored great foresight and anticipatory development of permanent principles of

public law in their dealings with the Indians of their day. They lived by sufferance of the dusky lords of the whole territory. They dodged or fought or bargained, as the exigency of each day required. They were weak and intruders, while the Indians were strong and in possession; hence the early dealings were naturally with Indians as tribes, having an organized, independent, quasi-national existence, not with them as individuals, subject to the governments the whites were gradually constructing. President Adams, in his Message of 1828, happily describes the early policy thus: "At the establishment of the Federal government the principle was adopted of considering them as foreign and independent powers, and also as proprietors of lands. As independent powers, we negotiated with them by treaties; as proprietors, we purchased of them all the land which we could prevail upon them to sell; as brethren of the human race, rude and ignorant, we endeavored to bring them to the knowledge of religion and of letters." It is easily seen that this was the only way in which an Indian policy could commence. The policy thus initiated was continued. In past time, government has dealt with tribes. The number of our treaties with tribes has been stated at above three hundred and sixty.

A review of the course of decisions of the courts shows the idea of the independent existence of tribes constantly recognized, though undergoing some modifications as the advance of our civilization and the settlement of the territory have required. According to the courts, the Indians have been considered by our people, and recognized in our public dealings, as distinct political communities, retaining, as such, their original, natural rights as the undisputed possessors of the soil from time immemorial. They have not, indeed, been regarded as vested, in their various tribes, with the full independence which is accorded to foreign nations; but have been deemed subject, in reference to their intercourse with nations abroad, to many of the restraints imposed by the United States upon its citizens; they are not nations in



such a sense that an Indian can claim immunity for a homicide on the ground that it was committed in the course of a war legalized by his tribe; nor can a tribe impose or collect a tax on an American trader; nor are they, while at peace, in any sense "enemies;" nor can an Indian maintain a suit, upon the ground of being a foreign citizen or subject. As organized in the tribes, they have been judicially described as domestic, dependent nations, considered by foreign nations as well as by ourselves to be so completely under the sovereignty and dominion of the United States that any attempt by a foreign power to acquire their lands or form a political connection with them would be an invasion of our territory and an act of hostility. They are considered, also, as subject to the general constitutional power of Congress to regulate commercial intercourse among them, and to prescribe regulations for the preservation and good management of their territory, and to enforce over it municipal and criminal laws; yet were treated (until by act of Congress of 1871 the treaty system was abandoned) as unquestionably capable, in like manner with foreign nations, of entering into treaties and acquiring treaty rights. And this distinct existence has been recognized as continuing, with reference especially to the power to regulate commerce, after the tribe has become enclosed within the limits of a State, and until the Federal relation to it has been withdrawn by concurrent acts of the general and State governments, or till the gradual diminution of the tribe and growth of white settlements render enforcement of a national law over Indians distinctively impracticable.

#### INDIANS AS INDIVIDUALS.

The course of decision does not, however, absolutely confine the red man to the tribal relation, or ignore him as an individual. He may, in single cases, become severed from a tribe, and be an individual subject, amenable to the laws and entitled to their protection, as is any other person. The attitude and course of

dealing of the Executive Department in past years have been such as to prevent, in great measure, personal rights from vesting in individual Indians. And there are many aspects in which an Indian is seen to be under personal disability. These causes have given rise to a current saying that the courts have held that Indians are not persons. This is a misconception. An Indian is a person. What has been said is that the law deals with the tribe, not with the person; that the courts cannot recognize the persons when the grant or contract is with the tribe. If there were a contract with a corporation, and an individual stockholder should sue upon it, he would probably be told that the courts could not recognize the separate members; the right was not vested in them individually, but in the corporate body as a whole. In like manner, a grant of lands to a tribe may not give to any one member such a right to a proportionate share as will warrant his maintaining a suit. Again, if the tribe were at war with the government, this might, on familiar principles, debar a member from suing in our courts; or if the laws of Congress forbade dealings of a given description between Indians and whites, an Indian might be denied a remedy to enforce a prohibited contract, on the ground that the contract, being prohibited, did not give rise to any right. So crimes wholly within a tribe may not be violations of American laws. Tenets like these do not authorize the assertion that an Indian is not a person.

The true view appears to be that the action of the judiciary in this matter is largely dependent on that of the Executive; that if the treaties or laws are such that rights in the individual members do not arise, a court cannot well entertain suits by individuals, not because they are not persons, but because they have not what the lawyers call "causes of action." But as fast as tribal relations are abandoned, and Indians are found dwelling as individuals under the jurisdiction and general laws of States, they will receive from the courts the benefit of legal remedies. This is now, by the Fourteenth Amendment, made obligatory on

the States; for it says, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." For the present, this provision may have but limited application to Indians, since the great mass of them are not dwelling within the jurisdiction of States, but are maintaining a semi-independent life as tribes; but no good ground appears for denying that, as soon as they become individual residents of States, the State courts must give them substantially equal remedies with whites. That the Federal courts may be expected to do this is indicated by the recent and noted decision of Judge Dundy. Being asked to accord to Standing Bear the privilege of the writ of *habeas corpus*, he promptly decided that it was his duty to do so; that an Indian had the same individual right to it as another person.

## CITIZENSHIP OF INDIANS.

It ought not to be forgotten that citizenship involves burdens as well as privileges. Allegiance exposes one to duties of military service and contribution to support of government, and to penalties for treason, as well as implies his right to render co-operation and enjoy protection. It is worthy of thought whether these burdens can rightly be cast on Indians, with whom we have so long been making treaties and exchanging pledges, without their consent. But the subject is usually discussed as if to be a citizen were, in all aspects, only a privilege.

A first glance does not reveal why Indians have not been made citizens as well as recognized as persons by operation of the Fourteenth Amendment. It says, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens." Are not Indians born within the United States? Yes. And are they not subject to its jurisdiction? In a sense, yes; but not, at least so judges in cases thus far heard have said, in the sense intended. Soon after the Amendment, a



half-breed Indian in Oregon offered to vote, for he said he was born in the United States; and he sued the inspectors for refusing his ballot. But the judge said he did not consider that the Amendment had made any difference about Indians as they are ordinarily living. The meaning is, he thought, All persons born in the United States, and born subject to its jurisdiction. The Amendment, he said, was not meant to introduce any new ideas of citizenship, but to apply and enforce the old familiar rule towards colored persons who were born in the country, and under the jurisdiction, yet were forbidden by the Dred Scott decision to be citizens.\*

Those who have been disposed to claim citizenship for the red man, under the Amendment, have not shown that to give it was within the national purpose. The chief motive is well known to have been to confer citizenship on the negro race. There was no general dissatisfaction with the legal *status* of the aborigines. The government had long treated the tribes very much as distinct, if not wholly independent, nations; had recognized their capacity, as such, to make treaties, to administer laws and penal justice among themselves according to their own ideas, and to hold rights and property in a collective capacity; and had abstained from attempting to regulate domestic affairs, or even to punish individual crimes, within a tribe. The general doctrine of all departments of the government had been adverse to conceding citizenship to individuals. They were not recognized as citizens in right of nativity; each individual member of a tribe was considered a subject of the tribe, not of the United States. The papposes were not natural citizens, because they were not born within the allegiance of the United States; but were likened to ambassadors' infants, who are esteemed, all over the world, subjects or citizens of the nation to which their father belongs, not of the country where they hap-

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\* *McKay v. Campbell*, 5 *Am. L. T. R.* 407.

pen to be born. And they could not be naturalized when they grew up, because they were not "white persons," to whom the old naturalization laws were confined. Thus it was officially said by Attorney-general Cushing, in 1856,\* that the privilege of naturalization had not been accorded to them by the general laws on that subject, though Congress has the power to confer it, by treaty or by a proper law, in their behalf. There was no wide-spread popular dissatisfaction with this general view of the relation between our race and theirs; and there are not satisfactory tokens that the people at large, in ratifying the Amendment, intended any change. Hence it is not strange that the courts, finding that the language of the Amendment does not imperatively and beyond question-introduce a change, adhere to the old view. The Amendment was, in present judicial opinion, intended to assure to the colored race (who did not live in distinct tribes) the benefit of the common-law rule implying citizenship from native birth in allegiance, not to disturb the settled idea that the Indians (being organized in tribes) were not born in allegiance.

But, in applying these doctrines, careful distinction must be drawn between Indians born under tribal relations, and children of fathers who, before the children were born, ceased to be members of tribes, and became individual residents under the general laws of a State or Territory. These children are born "within the jurisdiction," and are, by force of the Amendment, citizens. This is illustrated by a recent case† in which one Reynolds was indicted for killing Puryear, and objected that the court had no power to try him, for he and Puryear were both Indians; not by blood and birth, to be sure, but because they had both married Choctaw squaws. There is, or was, a treaty to the effect that whoever marries a squaw and is adopted by the tribe becomes a

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\* Relation of Indians to Citizenship, 7 *Op. Att.-gen.* 746.

† *Exp. Reynolds*, 18 *Alb. Law J.* 8.

Choctaw. The United States does not want him any more; the Choctaws may have him. His wife being an Indian, he becomes what may be termed an Indian-in-law. As the lawyers were all agreed that the court could not try for a quarrel or homicide between two Indians, but must leave them to the tribe, they investigated the parentage of Mrs. Reynolds and Mrs. Puryear. And they found that the supposed Choctaw grandparents of Mrs. Puryear were not members of the tribe, but dwelt as citizens of the State of Mississippi. The judge then decided that Mrs. Puryear was not an Indian, but a citizen, for the reason that when members of a tribe leave it, and scatter themselves to live as individuals among the people of a State, they become subject to the jurisdiction of our government, the same as citizens generally. His marriage, therefore, did not make Mr. Puryear a Choctaw, or take him out of the protection of American courts.

A summary of the whole matter is that members of tribes are situated, politically, very much as subjects of foreign governments are, who are "persons," to be sure, but who, while they dwell at home, can seldom acquire rights (unless in commerce, in which Indians do not engage) with which our courts have any concern. If they leave the tribal organizations and merge in the American community, they become entitled to personal rights and to judicial remedies, yet are not citizens. But the children of these are native-born citizens.

#### THE "RESERVATIONS" AND "TERRITORY."

The former policy of dealing with Indians by tribes involved the necessity of setting apart tracts of land where respective tribes might live, undisturbed by white pioneers and immigrants, and relieved as much as possible from temptations to make war with neighboring tribes. Tracts thus devoted are the "Indian reservations." They have been numerous, not always permanent; for the pressure of settlement has constantly broken in



upon them, and forced them farther west. A brief sketch of the Indian Territory will best illustrate this principle.

The Indian Territory is not like Idaho, Montana, and the others, where white settlers have immigrated, have built up settlements and civil institutions, have sought and obtained a Territorial government, and are developing, by inherent social forces, into a State. Its character is distinct and its history is peculiar. Half a century ago, the Indian problem then presenting, in the midway portions of our national territory, nearly the same embarrassments and difficulties as those which now surround it in regions farther west, the more considerate and far-sighted friends of the race urged upon the government the policy of setting apart some suitable region to which Indian tribes might be induced to remove, and where they might forever dwell. The plan was adopted by the government, dating from 1833. A region then in the remote West, uncoveted as yet by white settlers, was allotted. As originally set apart, it included nearly 200,000 square miles; but cessions to adjoining Territories and States have reduced it to about 70,000. To new homes within this region, tribes of Indians, then vexing the growing States upon or east of the Mississippi, were urged, hired, or compelled to remove. Every assurance was given them that they should be forever undisturbed. Thus the treaty with the Cherokees declares that it is the anxious desire of the government to give that nation "a permanent home which shall, under the most solemn guarantee of the United States, be and remain theirs forever; a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction, of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State."

In the decade between 1835 and 1845, several tribes were located in different tracts lying within this general region vaguely known as the Indian Territory; not always willingly—our war

with the Seminoles to enforce their removal is said to have cost \$15,000,000—but always, we believe, under the most solemn assurance that these new homes should be forever undisturbed by the encroachments of the whites.

Within these tracts, the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, being large tribes, and a number of small, scattering bands, have been for a generation, and to the number of about 75,000 in all, dwelling in some approximation towards the habits of civilization in the practice of agriculture and of the simpler arts. Seventeen reservations are counted. The inhabitants have partially relinquished the roving life of the traditional Indian, and have acquired some of the industry and steadiness of the white man. They have accumulated some fixed property, estimated at a total valuation of \$17,000,000. They have 176 schools, employing above 200 teachers, and instructing nearly 5000 pupils. They have churches and Sunday-schools, are willing readers, and, to a limited extent, buyers, of the Bible and of religious literature, and have even some newspapers.

But the waves of American progress steadily beat upon and threaten to undermine or overwhelm these walls. The dimensions of the tract have been reduced to about a third of the original size. One railroad has made its way through. Another is trying hard to do so. Strong efforts have been made, recently, in Congress to give to the whole region a Territorial government and open it to white settlement.

#### THE OUTLOOK.

Well-informed and judicious friends of the Indian race urge earnestly that, at least as fast as is consistent with a just regard to Indian claims under past pledges of our government, the tribal relation ought to be abandoned, and the Indian dealt with as an individual, constituted a citizen, and addressed by the same motives, hopes of advancement, and apprehensions of punishment as the white man. President Grant's advocacy of this

principle will be remembered. The idea has many recommendations, and has made warm friends. It is easy to see that progress in this direction is certain and may be rapid. Congress has (in 1871) abandoned, for the future, the policy of dealing with tribes by treaties; this change must steadily tend to merge individuals with the general community, as fast, at least, as they consent. Becoming merged, the Amendment and the Civil Rights legislation give them the rights common to all persons, of judicial protection in life, liberty, and property; and the Amendment impresses upon their progeny the *status* of citizens. A moderate naturalization law might accelerate this progress. And it is to be hoped that better ways may be soon found, and a wiser course pursued than the past has shown, for reconciling the fearful opposition of interests between the pioneer white settlers and the Indian residents of frontier lands. How this may be attained is a subject of executive, not of judicial, duty, and does not come within the scope of our task.



## CHAPTER VIII.

## THE CHINESE.

THE Chinese question, although of embarrassing proportions, is of recent origin. It is one of those fogs which gather in a night; let us hope that the sunlight of deliberate, magnanimous reflection will resolve it.

## THE BURLINGAME TREATY.

Scarcely twelve years have passed since the Burlingame treaty was ratified (November 23, 1869). The exclusiveness of China down to the middle of this century is well known. She repudiated commerce, repulsed immigrants, and forbade emigration, ignored diplomacy, and built a wall against neighborhood. The treaty attested that this policy was abandoned; it permitted commerce, opened diplomatic relations, and, what is more to the present purpose, authorized mutual immigration. Among the influences which appear to have won China to this departure from her traditions, the demand for cheap labor for the development of the resources of the Pacific coast seems to have been prominent. There were immense tasks to be performed, in mining, agriculture, manufactures, railway-building, even in household service. California called loudly for laborers, and John Chinaman threw aside his recluse policy, and went. The accession of Chinese immigrants to the population of this country is estimated at a quarter of a million, nearly all of them working-men.

By the Burlingame treaty, the two governments recognized the inherent and inalienable right of man to change his home and allegiance, and the mutual advantage of the free migration

of citizens and subjects from one country to the other; and they agreed that citizens or subjects of each country residing in the other should enjoy there all privileges accorded to persons from the nations most favored in that respect.\* This agreement formed the basis and invitation for that immigration which the Pacific coast has of late years felt to be so burdensome; and it is chiefly this which embarrasses any projects of legislation to restrict it now.

#### IMMIGRATION UNDER THE TREATY.

For a time all was pleasant and prosperous. The services of the Chinese were desired, their coming was welcomed, their peculiarities were tolerated, their acceptance of low wages was commended. It is difficult to see how some portions of the

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\* 16 Stat. at L. 391. The provisions are:

"Art. V. The United States of America and the Empire of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other, for purposes of curiosity, of trade, or as permanent residents. The high contracting parties join, therefore, in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offence for a citizen of the United States or Chinese subject to take Chinese subjects either to the United States or any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country, without their free and voluntary consent, respectively.

"Art. VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

prosperity of California could have been attained without their help. But a change dawned. A diminished demand for labor in the Eastern States, culminating in 1873, impelled immigrants of Caucasian origin, whose hopes of employment at liberal wages on the Atlantic side, or in the hither West, were disappointed, to seek work and wages on the Pacific coast. The supposed necessities of employers, who could not produce goods at the reduced market prices while paying to laborers of European origin the wages they demanded, forced them to the experiment of employing the Chinese competitors for the work already too limited and too scantily paid for the needs of those who had come from Europe to seek it. Hence the persistent and exciting controversy of the past five years. Against allowing a continuance of Chinese immigration the arguments are urged that the new-comers are ignorant, vicious, degraded heathen with whom white laborers cannot be expected to live and labor; that they do not come, in treaty phrase, either "for purposes of curiosity, of trade, or as permanent residents," and cannot assimilate with our people, and do not strive to, but to glean and hoard money for a return to their native land when a small competence, adequate to the beggarly wants of a Chinaman at home, is attained; that they threaten to come in overwhelming numbers; that they underbid and ruin native American laborers, and those of foreign birth who have families and permanent homes here; and that they introduce and maintain heathenish, vicious, and debasing modes of life which are repulsive to our people; and that the reciprocal promises of the treaty have never been performed by China. In behalf of the Chinese it is denied that any signs appear of numbers to come which need give anxiety. Any ignorance, vice, and heathenism ought to be met, it is said, not by repelling the race from our shores, but by active educational and Christianizing labor. Their willingness to work at low wages is claimed to be a benefit to the country at large, and a matter which ought to be left to adjustment by competition



upon sound business principles; and their purpose to return home is excused on the ground that they have been made so unwelcome here. The traditions of American policy, so often asserted in behalf of European immigrants, declaring this country the refuge and asylum of the poor but honest laborer from all parts of the world, are cited. And, additional to all these general considerations, the treaty is asserted as conferring, while it remains in force, rights which neither individuals, trades-unions, nor city or State governments can disregard, and which are reinforced by the general Civil Rights legislation of Congress, and the solemn declaration (in 1868) of the right of expatriation.

#### LEGISLATION BY CALIFORNIA.

But the judicial aspects of the controversy claim attention here, rather than its moral and economic bearings. The subject was first brought into the courts upon a stringent law enacted by the Legislature of California to repress Chinese immigration. By this enactment a "Commissioner of Immigration" was clothed with authority, if satisfied that any immigrant, not a citizen of the United States, was likely to become a public charge, or was a convict, or a lewd or debauched woman, to require the ship-owners bringing him to give bonds against his becoming a public charge for two years. If the bond were not given, the immigrant must not be landed from the vessel. In a test case this commissioner assumed to decide that a party of twenty Chinese women brought into the port of San Francisco were lewd characters; and as the ship-owners would not give the bond, the girls were kept on board ship. They appealed to the courts, and the controversy went up to the Supreme Court at Washington, which adjudged the statute void.\* The passage of

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\* *Chy Lung v. Freeman*, 92 *U. S.* 275. There was a prior decision to the same effect by the United States Circuit Court, while the State court sustained the State law.

laws which concern the admission of citizens and subjects of foreign nations to our shores belongs (said the court) to Congress, and not to the States. It has the sole power to regulate commerce with foreign nations. And if a State has some right, in the nature of a police power, to protect herself from immigration of paupers and convicts, this statute goes far beyond what is necessary, or even appropriate, for such purposes.

This decision transferred the controversy to Congress; and in the Forty-fifth Congress (1878-79) several bills were urged having the general object to exclude the Chinese by name and by means of stringent measures. Proposals to impose upon each Chinaman who comes a tax of \$250, enforced by threat of five years' imprisonment; to fine any ship-owner on whose vessel Chinese are employed from \$100 to \$500 for each one, enforced by a sale of the ship; to punish employment of any Chinaman on government works by imprisonment and heavy fines; and to lay a penalty on ship-owners of \$100 for every Chinese passenger above a complement of fifteen brought to this country by any vessel—are specimens of these bills. Not the least in importance was one seeking to exclude the Chinese under cover of general terms. Its first provision declared it unlawful "to bring to the United States any pauper, lunatic, convict, criminal (not including political convicts or criminals), any idiot, deaf and dumb, blind, maimed, or infirm person, or one unable to support himself, or any person kidnapped or transported against his will, or any person under a contract for the labor of such person, or any person brought or coming for the practice of immoral trades or occupations, or any person or persons by or through whose presence in this country the free institutions thereof would be endangered." This sought to avoid the treaty; it meant "Chinese," without saying so, leaving the argument open that they were not more excluded than other nationalities. A second provision gave the consent of Congress that any State might enact laws or prescribe regulations to enforce the prohibition above

quoted. This sought to avoid the operation of the Supreme Court's judgment.

All these measures aroused the instant objection that they proposed to violate the Burlingame treaty, and to this the retort was made that Congress had power to abrogate a treaty.

#### CAN CONGRESS ABROGATE A TREATY?

In the discussion of this question, the opponents of the proposed legislation conceded that in a sense Congress has this power. If the question is, not whether the treaty continues obligatory, but what department of government is clothed with power to declare that it has become null, that power may well be conceded to Congress. There is, doubtless, a moral right, in extreme cases, to abrogate a treaty. Even though permanent in terms, the nature of the compact may be such, the circumstances may have so far changed, or the conduct of the other party in evading its obligations may so dissolve them, as to give a nation the right to declare it will be bound no longer. But conceding to Congress the power to declare this, does not (they said) concede an arbitrary power to break treaties from mere change in the national desire and interest. The exercise of any such right is a national act of the utmost gravity and delicacy; and where no mode of terminating the compact is prescribed in the instrument, but its terms profess a permanent engagement, certainly notice and negotiation, some attempt to reconcile the new wishes of the one nation with the rights and interests of the other, ought to precede a repudiation. A treaty is a contract between nations. That it cannot be enforced as one, arises simply from the want of any tribunal, not from any lack of force in the contract. Whoever will say that this government may, at its own will and for its own new interests, break its past and solemn engagements with foreign powers, merely because there is no way to compel performance, has no just sense of the moral obligation of an



agreement. It may be that the injured party has no redress but in war, and that, by reason of relative weakness, that is an impracticable remedy; yet this cannot lighten the duty and responsibility of a nation to do as it has agreed.

Decisions of the courts were asserted to support the proposition that Congress may repeal a treaty, and prominent among them was one by Justice Curtis.\* It was answered that he by no means held that the nation is not morally bound by its treaties, or that Congress is superior to the obligation. The case before him arose thus: Our government made, in 1832, a treaty with Russia that her products should not be subject to a higher rate of duty than similar goods from other countries. In 1842 a tariff was passed, laying lower duties on Indian hemp than on Russian hemp. In an action for duties charged on a lot of Russian hemp, the importers asked the court to disregard the tariff rate because it violated the treaty, and objected that as treaties are made by the President and Senate, so they should be changed by them, not by Congress. The court refused. Justice Curtis explicitly recognized the contract obligation of treaties, and that the foreign sovereign between whom and the United States a treaty has been made has a right to expect and require its stipulations to be kept with scrupulous good faith, but held that the question whether the Tariff Act of Congress was consistent with the treaty was not a judicial question which the courts could try. He said that the power of ascertaining whether just cause warranted and sound policy dictated the abrogation of a treaty was not vested in the courts, but in Congress. The courts can only administer the existing law as they find it; and must enforce the latest act as the controlling law. It was in this connection, and in explaining that the power to deal in altering treaties which his decision denied to the courts existed somewhere, that he

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\* *Taylor v. Morton*, 2 *Curt.*, 454.

attributed it to Congress. Moreover, in this case Congress had acted, which includes action by the President and Senate; and it is not easy to see how the vote of the House could impair what was sufficient without it.

Other remarks of courts, apparently to the effect that Congress may supersede a treaty, were explained in like manner; and by reference to the principle that the judiciary does not deal with foreign relations, but with individual rights. On international questions the courts decline to pass; they simply follow the decision or action of the political power. Courts have little occasion to determine questions between the United States and foreign nations. Their function is to ascertain the rights of persons; and they will concede that what Congress has enacted, or the President has done, is obligatory on the courts, without meaning that it is sustainable by international law. For example, where a man brought from abroad on a charge of larceny has been put on trial for false pretences, and his counsel have objected that this was breaking the treaty, the judges have said, in effect, The prisoner is in court. We have naught to do with how he comes here. The President has procured him to be brought home, and the District Attorney moves for a trial; the court must try the case, and leave the international question to the President. This decision that the courts must administer the recent act of Congress rather than the earlier treaty, in a cause between individuals, is very different from deciding that a treaty expressed to be permanent may lawfully and rightly be abrogated by Congress without diplomatic notice or negotiation. Yet the decisions (it was alleged), as a general rule, go no further than this; they merely disclaim power to consider the treaty rights of the foreign nation. In one cause, where two individuals claimed the same land, one by a title founded on an earlier treaty, and the other by letters patent issued under a later act of Congress, the Supreme Court said, "Congress is bound to regard the public treaties;" and the treaty title

was sustained. The advocates of Congressional abrogation of the treaty were pointedly reminded that in the Winslow affair, a few years previously, the Department of State at Washington contended very earnestly that an act of Parliament could not modify the obligations cast by a treaty upon Great Britain. The Extradition Treaty of 1842 provided, in general terms, for sending offenders back to this country, without any particular provision protecting them as to the trial here. The British authorities became dissatisfied that an offender claimed for one crime, which was covered by the treaty, was liable to be tried here for another one, which was not. Parliament, without consulting the United States on modifying the treaty, passed an act directing that when a prisoner was claimed for extradition, an assurance should be exacted, before he was surrendered, that he should be tried only on the charge then preferred. Diplomacy at Washington repudiated this demand; denied that any act of legislation to which the United States was no party could modify rights assured by treaty, and declared all action in favor of British claims to extradition suspended until that government should conform to the treaty or negotiate to alter it. This view had the support of American public opinion at that time, yet is not easily reconciled with the position that Congress, without negotiating with China for a modification of the Burlingame treaty, could legislate in contravention of it.

To give a more popular illustration of the argument, let Congress be likened to a merchant, and the court to his clerk. Suppose the merchant one morning sells a bill of goods to a customer, and he shows the invoice to his clerk, and says, "Let these goods be ready for this buyer when he calls for them; I have agreed on price and terms with him." But at noon the merchant changes his mind; he has learned that the buyer does not deserve to be trusted, and he countermands the directions given to the clerk. In the afternoon the buyer comes, expectant



of his goods. The clerk withholds them. The buyer shows his bill of sale and argues for his contract. The clerk says, "The proprietor has since told me not to let them go."—"But your employer has agreed that I shall have them; is he not bound to his agreement?"—"I have nothing to do with his agreement; my duty is to obey his instructions; and his last words to me were to keep the goods. If that is contrary to his contract, you must settle the matter with him."

Thus it is that the courts have said Congress may repeal a treaty. Courts do not have the deciding of questions between governments, and when such questions are presented, they decline them. In a lawsuit between persons, when one has claimed a treaty and the other a later act of Congress, the court has said, "We must administer the act of Congress, as the latest law. If it breaks the treaty, that is for Congress to settle. Perhaps there was just cause for breaking it. We take our orders from Congress in deciding lawsuits; Congress, and not the courts, is the proper body to decide questions with foreign nations."

The discussion in Congress resulted in the passage of one of the bills, which was vetoed by the President, chiefly on the ground that, without disputing the abstract power of Congress, in a proper case, to abrogate a treaty, our relations with China were too important and delicate to be sundered in a summary manner, and without notice or diplomatic negotiation. The veto was interposed March 2d, 1879, on the eve of the adjournment.

#### FURTHER ACTION IN THE COURTS.

Pending the Congressional debate and the adjournment, John Chinaman won some victories in the Federal courts. His claim to naturalization was decided for or against him in different courts, according as the presiding judge considered that "white persons," in the naturalization laws, meant merely *not black*, or strictly *white*. The question is not yet (1880) authoritatively decided.

In one interesting case it appeared that the magistrates of California proposed, by way of treating convicts of all nationalities with strict equality, to cut off the Chinaman's queue when he was put in jail, just as they crop the heads of other offenders. But John complained to the Circuit Court, which told the magistrates they must do no such thing; and said, as it were, that Chinese pigtails are protected by Magna Charta, the Declaration of Independence, the Constitution, and every palladium of liberty; and that if the California authorities desired equality between Chinese and Caucasians in the matter of head-dress, the true way was to grow pigtails on the heads of the Caucasians.\*

The Circuit Court in Oregon had occasion to consider the rights of the Chinese in another aspect. Under pressure of the objections to employment of Chinese labor, the Legislature of Oregon passed a law to prohibit its being employed upon street improvements and public works. This law being in force, Baker & Co., a firm of contractors for such works, put in a bid for a job of 50,000 dollars' worth of work upon improvements in Portland, which the city authorities advertised to put under contract. Their bid was the lowest, and they were entitled to the contract. It was surmised that they were intending to employ Chinese laborers in doing the work; and the city authorities refused to sign and deliver the contract unless the contractors would give bonds that in performing it they would comply with the law, and no Chinese should be employed. The contractors complained to the court. Upon certain technical questions connected with the proper way of bringing the suit, the judge ruled against them, but upon the general question of the right to employ Chinese labor, the decision was in their favor. The court cited the familiar provisions of the Burlingame treaty recognizing the right of emigration and assuring the Chinese of equal rights with other foreigners, and declared that a State cannot

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\* *Ho Ah Kow v. Nunan*, 5 *Sawyer*, 552; 13 *West Jur.* 409.

legislate so as to interfere with their operation. The treaty is the supreme law, and, until it has been abrogated or modified, the courts must enforce it. In agreeing that the Chinese may become residents here, it forbids any State to impose restraints and limits upon the Chinese as a race in respect to their labor and pursuits. The right to reside here implies the right to follow any lawful calling or pursuit open to other foreigners. The question whether the Chinese may wisely be allowed to come and labor here without restraint is a serious one, but it belongs solely to the national government, and is decided, for the time being, by the treaty. While that stands, no State can interfere.\*

These positions certainly have some support from the acts of Congress which declare that the right of expatriation is a natural and inherent right of all people, in recognition of which our government has freely received emigrants from all nations;† and that all persons shall have the same right in every State to make and enforce contracts, and the same benefit of laws for the security of persons and property, as is enjoyed by white citizens.‡

#### LEGISLATIVE ACTION IN CALIFORNIA.

Meantime California, during the spring and summer of 1879, by a remarkable duplication of political action, representing the sentiment of the community, renewed her remonstrance against the effects of the immigration, and her demand for some relief from the treaty, in two very emphatic ways. While Congress was in debate over bills to restrict the immigration, a constitutional convention was in session in the State; and its work was submitted to the people and ratified by them in May following, and is now in force. It declares that no native of China shall ever exercise the privileges of an elector. It devotes an entire article to the Chinese by name, describing them as aliens likely

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\* Baker v. Portland, 5 *Sawyer*, 566.

† Rev. Stat. § 1999.

‡ Rev. Stat. § 1977, 1978.



to be paupers, mendicants, and criminals, and commanding the legislature to impose conditions on their coming or remaining, and to provide for their removal if they will not comply. No corporation may employ a Chinaman; no Chinese shall be employed on any public work; their immigration is to be discouraged by law, and all companies importing them are to be subject to penalties; cities and towns are empowered to expel them. And subsequently, in September, under a law of 1877 providing for a popular vote upon the question of permitting Chinese immigration, an election was held, and resulted, according to the San Francisco journals, in a vote of 154,638 against allowing it, to 883 only in its favor. By these two grave State acts California has shown that her sense of need is immediate and deep. What measure of relief shall be accorded is one of the pressing questions of the time. It continues to excite efforts in Congress for restrictive legislation, and to engage the thoughtful attention of the Department of State. Very lately a commission of citizens deemed especially qualified has been nominated, to undertake the duty of maturing measures which shall, if possible, protect the industrial and social interests of California, without imperilling the commercial interests of America in China, or retracting the time-honored policy and traditions of our government towards foreigners.

## CHAPTER IX.

## THE NATIONAL BANKS.

THIS chapter will not give a general account of banking, but will only describe the important change by which, in recent years, a major part of the banking business and interests of the country have been brought under the supervision and control of the national government.

## THE "FREE-BANKING" SYSTEM.

It is not obvious on the surface why a law which requires banks to deposit in the custody of government securities equivalent to cash for the full amount of its circulating notes, and more, should be called a "free-banking" law. The reason is found in the contrast between this system and the one which preceded it,\* which required special charters. In the earliest times, no doubt, any individual might engage in banking business, in any of its branches. A chief branch consisted in issuing bank-notes adapted and intended to circulate as money. Long ago it was found inconvenient and dangerous to allow this to be done by any and all persons at pleasure, and the privilege was taken in charge by government. Thus in all the early years of American legal history, the general rule was that persons who desired to issue bank-notes must obtain leave; and this was usually granted in the form of a charter from the State legislature.

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\* There was in New York, in Vermont, and perhaps elsewhere, an intermediate plan known as the "safety-fund" system, in which all the banks contributed to a fund to redeem the bills of those which became insolvent. Our purpose does not require any extended account of it.

Through quite a period Congress maintained a United States Bank, chiefly as a fiscal agent of government; and in newly settled States the restriction or prohibition of issuing bank-notes without charter authority was not always enforced. But, with these exceptions, the general doctrine, prior to 1838, was that issuing circulating notes was a privilege granted by the legislature of the State; so that only those persons to whom the legislature would make the grant might exercise it. The privilege was important and valuable; and, in the older and more conservative States, powerful political influence or adroit management and liberal expenditure of money were needed for procuring a charter. The charters named the men who were to be the members of the corporation, and these prescribed the terms and manner of admitting new members. Thus, the special-charter system, while it gave a legislature means of providing that only prudent, responsible, and solvent men should be bankers, and, wherever due care in granting charters was observed, afforded assurance that banks would be judiciously conducted, yet treated banking as a monopoly to be vested in the approved or favored few. Upon the other hand, the charters were often given, especially in newer States, without due consideration, or too freely. It is related that Aaron Burr, being employed to procure one from the New York Legislature, drafted an act authorizing the corporators to build an aqueduct for supplying New York city with water, and saying that they might use their surplus capital in other lawful transactions. The legislature, without perceiving the hidden purpose, passed the bill, whereupon the corporation straightway opened a bank. Instances are known of charters procured by gross bribery. The dominant political party would, very generally, grant charters to its own partisans and refuse them to its opponents. In one instance, twenty-five banks would have been chartered in one act if the governor had not vetoed it; and by another act which was passed, forty-one banks were *authorized*, thirty-seven of which were started. Thus, although



requiring a special charter was in theory a good security against too many banks or weak ones, it was not so in practice.

In 1838, New York initiated a new system. The essential ideas were that banks should give good money security for paying their notes, and that (on this condition) the privilege of banking should be free to all persons. The law prescribed that any persons who pleased might form a bank, no application to the legislature being required; but they must deposit with the State Comptroller at Albany public stocks, or bonds and mortgages, in exchange for which he should furnish to them a corresponding amount of circulating notes printed in the name of the bank. Then, so long as the bank redeemed these notes on demand, it was allowed to draw, periodically, from the comptroller the interest on its securities in his hands; so that the proprietors did not lose by making the deposit. But whenever it failed in redemption, the comptroller could sell the securities and use the money in paying the dishonored notes. Banking in this system was called "free," not in the sense of being unregulated, but in the sense that it was no longer a privilege or a monopoly granted to chosen persons, but was open to all on equal terms.

After nearly ten years' trial of the free-banking system (or the secured-banking system, as it might more lucidly be called) in New York, where it originated, other States adopted it. For example, Michigan passed a free-banking law in 1849; New Jersey, in 1850; Virginia, Illinois, Ohio, Vermont, and Massachusetts, in 1851; Indiana and Tennessee, in 1852; Louisiana, in 1853; Wisconsin, in 1854; Missouri, in 1856; Iowa and Minnesota, in 1858. Thus, down to 1860 and 1861, when secession and the war commenced to derange the business of the country, the system was gradually but steadily extending among the States. Therefore, when, in 1863, plans were formed for establishing, by a uniform national law, a system upon which banks might be organized and conducted alike all over the country, the prin-

ciple of intrusting circulating notes to any persons who would give security to redeem them, rather than to persons selected and named in a charter, was naturally adopted.

#### ADVANTAGES OF A NATIONAL SYSTEM.

Probably an urgent motive for establishing the national banking system was a desire, growing out of the political troubles of the times, that there might be in all parts of the country banks conducted in sympathy with the national government, to which the business of the government might safely be intrusted, and by means of which the pecuniary resources of the country might be enlisted in aid of the nation. This purpose has, at the present day, lost its dominant importance, and is of less interest to the general reader than a brief comparison of the advantages offered to the public at large by the national and State systems. Before the war, when State banks only were known, the use of their notes was attended with much uncertainty and inconvenience. Not half of the States had adopted the New York system of requiring security for redemption, and most of those which had done so prescribed it only as an alternative system, and continued to issue special charters without imposing any conditions for protecting the billholders. Thus banks of all grades of solvency existed, and no one could tell as notes passed through his hands whether the institution from which they came was trustworthy or not. Some banks had no capital, or nearly none. In others the capital was nominal, consisting in notes which stockholders had been permitted to give for their shares, or in other securities of doubtful value which had been received for subscriptions. In the older and wealthier States many banks existed most prudently and successfully conducted. The "Massachusetts Bank," chartered in 1784, continued business prosperously for more than ninety years under the State law, and until it was converted into a national association. Banks under Pennsylvania and New York laws were equally stable and successful; but in Western

and Southern States the result was often different. The bank-notes of the period were disrespectfully called "shinplasters," a term derived from a rumor that Revolutionary soldiers found their Continental currency so worthless that they used it for bandages. And many banks in the remoter parts of the country received the appellation of "wild-cat banks," though whether from a picture of a wild-cat or panther on the notes of one which made a noted and ignominious failure, or because the assets sometimes embraced panther-skins (which, in the days when a bounty was allowed upon them, represented a certain value), may be uncertain.

It is known that, as late as 1854, the circulation in one of the principal Western States consisted chiefly of notes issued by two banks in Georgia, and which circulated upon the personal credit of two or three of their non-resident stockholders, independent of reliance upon the character or management of the banks by which they were issued.

Even the governors of States the laws of which allowed such banking frankly and earnestly objected. In 1853 the Message of the Governor of Indiana said, "The speculator comes to Indianapolis with a bundle of bank-notes in one hand and the stock in the other. In twenty-four hours he is on the way to some distant point of the Union to circulate what he denominates a legal currency authorized by the Legislature of Indiana. He has nominally located his bank in some remote part of the State, difficult of access, where he knows no banking facilities are required, and intends that his notes shall go into the hands of persons who will have no means of demanding their redemption." The governors of Michigan and New Jersey made similar remonstrances to their legislatures. These objections disclose another aspect in which the system of State banking was inconvenient. It afforded temptation to unscrupulous men, having large and frequent payments to make to employés, to contrive for a supply of bank-notes from an institution remotely located;



so that they made an extra profit out of the delay which occurred before those to whom they paid the notes could get them collected. And, generally, those who received notes of solvent banks were subjected to great trouble and loss in collecting specie for them when that was desired. In earlier times each bank was bound to pay only on presentation at its own office. Later, the larger and more judicious States required their banks to make provision for redeeming at some central place, or the banks voluntarily did so. Thus, notes of New England banks were redeemed at the Suffolk Bank in Boston. But arrangements of this kind were not universal; and where they existed, they rendered the notes good only within convenient distances from the appointed place for redemption. The general consequence was that a bank-note was available only within a region round about the bank. As soon as it was carried to a distance, it became subject to distrust and discount. Pennsylvania notes could hardly be used in New York, or New York notes in New England, without meeting objection to them or submitting to a deduction. A person intending even a moderate journey needed to exchange his bank-notes for gold before starting, else he would soon reach a distance beyond which he would have no money, though he might have plenty of bills. So transmission of bank-notes by mail, to pay debts or prices at remote points, was out of the question.

There was no adequate supervision in most of the States over the management of their banks. Directors did very much as their own interest and convenience dictated with the funds; or, what was worse, left everything to presidents and cashiers. Hence failures of banks were frequent; and when a bank failed, a heavy loss fell upon the billholders as well as upon depositors and stockholders. The capital was often found to be dissipated, there were no securities available for redeeming the notes, and it was not then usual to make stockholders individually liable.

By viewing the varied inconveniences of this condition of affairs, in all its aspects and diverse effects on daily business, and comparing it with the general confidence now reposed everywhere in national-bank notes, the reader will realize how greatly the public convenience has been promoted by the change.

A twofold doubt has been suggested as to the wisdom of continuing the national-bank system. Upon the one hand, there are some persons who believe that it would be better for government itself to issue the great bulk of the currency needed. Upon the other hand, there have been complaints that the national banks enjoy too great favor as compared with State banks; that it would be more just and more consonant to American principles to return, now that the exigency out of which national banks arose is over, to the system of State banks. Persons about to start a bank would, doubtless, examine very closely the question whether one kind or the other enjoy special privileges and opportunities. The general reader will probably be satisfied upon this point when he understands that the national banks are not in any respect forced upon the country. The system is free and optional. Persons who believe they can make money in a national bank have liberty to try; that is all. Whoever does not think a national bank profitable need not engage in one. If the directors of a State bank consider the privileges accorded to a national bank are greater than they ought in justice to be, they can change their institution from the State to the national form; and if they find themselves mistaken, they can change back again. A large proportion of the national banks were formerly banks under State laws, and there have been several instances of a return by such institutions to the State form. If the people in any part of the country wish for more circulating notes in that region, they can form additional national banks and thus obtain them.

In order that this aspect of the subject might be fully understood, the comptroller of the currency was asked by Congress,

about 1876, to report in what manner the national banks and their shares were distributed over the country, so that it might be known whether one part of the land was favored to the prejudice of another. In answer he gave many facts showing that the shares are very widely distributed. The capital stock of the national banks in operation July 1, 1876, was a little more than \$500,000,000; and, as a few of the converted State banks have shares of less than \$100 each, the total number of shares was rather more than six and a half millions. Looking at the location of the banks from which the shares were issued, it appeared that in the Eastern States there were banks issuing 2,018,826 shares, of which the banks of Massachusetts issued 988,700; in the Middle States, 3,051,378 shares, of which the New York banks issued 1,482,746; in the Southern and Southwestern States, 429,393; in the Western States, 937,333; and in the Pacific States and the Territories, 69,000. Looking at the residences of shareholders, they were found living in every State, and in every Territory except two; and there were some in foreign countries. The number of shares held in the Eastern States was 1,858,398; in the Middle States, 2,702,269; in the Southern and Southwestern States, 358,335; in the Western States, 839,391; and in the Pacific States and the Territories, 62,515. Total in the country, 5,820,908. The number of shareholders was a little over 200,000; making the average amount of stock held by each shareholder about \$3100. The average amount held by each individual in the Eastern States was about \$2100; in the Middle States, \$3100; in the Southern States, \$3400; in the Western States, \$4800; and in the Pacific States and the Territories, \$8300. These facts (when one considers that the Southern States did not commence establishing banks so early as the Northern, and that during the paper-money times California preferred to use gold) indicate that the distribution has been governed by natural demand, not by any favoritism in the law or its administration. The way is open for any one of a



different opinion to establish a national bank in the place where he thinks there is need of one.

There is no reason to believe that the figures have changed for the worse since 1876. The latest statistics as to the distribution of the national and State banks in different sections of the country are summed up in the following table:

GEOGRAPHICAL DIVISIONS.	STATE BANKS,* SAVINGS-BANKS, PRIVATE BANKERS, ETC., May 31, 1878.			NATIONAL BANKS, June 29, 1878.			TOTAL.		
	No.	Capital.	Deposits.	No.	Capital.	Deposits.	No.	Capital.	Deposits.
New England States.	555	11.12	422.56	542	166.52	128.83	1,097	177.64	551.39
Middle States.....	1,326	77.09	544.07	634	177.18	374.89	1,960	254.27	918.96
Southern States.....	520	35.55	47.77	176	31.49	35.94	696	67.04	83.71
Western States and Territories.....	1,999	81.62	228.09	704	95.20	137.50	2,703	176.82	365.59
United States....	4,400	206.38	1,242.79	2,056	470.39	677.16	6,456	675.77	1,919.95

From this table it will be seen that the total number of banks and bankers in the country at the dates named was 6456, with a total banking capital of nearly six hundred and seventy-six millions (\$675,776,198), and total deposits of nearly one thousand nine hundred and twenty millions (\$1,919,954,201).

Another aspect of the question whether equal justice is done to different portions of the country in the administration of the banking law relates to the allotment of circulating notes. Formerly, when the aggregate amount of circulation allowed to be issued was limited, this may have been theoretically im-

\* To understand what proportion of the State banks mentioned in the table are incorporated banks, what are private bankers, etc., read the following table:

GEOGRAPHICAL DIVISIONS, May 31, 1878.	STATE BANKS AND TRUST COMPANIES.			PRIVATE BANKERS.			SAVINGS-BANKS WITH CAPITAL.			SAVINGS-BANKS WITHOUT CAPITAL.	
	No.	Capital.	Deposits.	No.	Capital.	Deposits.	No.	Capital.	Deposits.	No.	Deposits.
		Mill'ns.	Millions.		Mill'ns.	Millions.		Mill'ns.	Millions.		Millions.
N. E. States.....	42	8.19	15.06	71	2.86	3.23	1	0.07	1.14	441	403.43
Mid. States.....	217	42.45	122.10	916	34.45	61.92	3	0.16	1.37	190	358.68
South. States....	293	27.38	30.67	280	7.30	13.65	4	0.88	1.28	3	2.14
West. States } and Terr..... }	361	46.33	61.65	1,589	33.16	105.00	15	2.13	22.39	34	39.05
United States.	863	124.35	229.48	2,856	77.80	183.83	23	3.24	26.18	668	503.30

portant. At the present time the law allows a bank to be opened, and circulating notes to be furnished, wherever the community desires one and will deposit securities to pay the notes. And banks on small capital, such as are suited to new or sparsely settled regions, are allowed a slight advantage over larger institutions in the amount of notes they may receive. All questions as to the fairness with which different parts of the country are treated, in according to them any privileges which are ascribable to the national banking law, seem to be superseded, so long as the opening of a bank anywhere, and upon equal terms, is free to all applicants. For facts as to the allotment of notes as it existed in 1879, see tables on pages 100, 101.

#### THE PRESENT SYSTEM SUMMARIZED.

The present condition is that about two thirds the incorporated banks in number, and a still larger proportion estimated by capital, are national banks; and these put forth nearly the whole issue of bank-notes for the country. These are all designated by the name national; and the law forbids a State bank to use that word in its name, so that the two kinds may be readily known apart. The organization of the two kinds is very differently conducted. State banks are formed as the law of the State directs, however that may be. National banks are organized upon one uniform plan operating alike throughout the country, which allows any persons to open a bank and issue circulating notes upon the simple condition of giving security to pay them upon demand; and does not give that privilege to any others. The other departments of banking business—loans, discounts, collections, etc.—are carried on substantially alike in banks of both kinds. There are some prohibitions and penalties resting upon the officers and managers of a national bank which do not apply to banks of the old kind; but in most of the transactions of ordinary business the customer would not notice any difference between the two. In case, however, a bank is imprudently man-

## THE NATIONAL BANKS.



aged or becomes insolvent, an important difference is observed. What becomes of the property and affairs of a State bank depends upon the law of the State; and this may differ in different places. A failing national bank is taken under the charge of a receiver, subject to the directions and supervision of the comptroller of the currency. The proceedings, no matter where the bank is located, are under a uniform law. The securities in the comptroller's charge are sold, and invariably furnish sufficient funds for paying all the outstanding notes. Stockholders and depositors may probably lose by the failure; but there has been no instance under the national-bank system in which billholders have not been paid in full.

## THE TAX ON OTHER CIRCULATION.

It is not denied that Congress has desired to discourage State banks from continuing to issue circulating notes. They are not forbidden to do so, but the business has been rendered unprofitable by a tax. Every national or State bank must pay a tax of ten per cent. on the amount of notes of any State bank which it uses for circulation. This has driven State bank-notes out of use. Complaints have been made that this tax is oppressive; and it is urged that the general government ought not thus to seek to prevent State bank-notes. However sound the objection may be, it lies only against the rate of the tax, not against the national-bank system. It can at any time be cured by diminishing the tax. It therefore forms no reason for relinquishing the general system of national banking.

NOTE.—The tables in this chapter have been copied, and much of the information which it contains obtained, from reports of John Jay Knox, Esq., Comptroller of the Currency, which have been kindly furnished by him to the author for the purpose.



NUMBER OF BANKS ORGANIZED AND IN OPERATION, WITH THEIR CAPITAL, BONDS ON DEPOSIT, AND CIRCULATION ISSUED, REDEEMED, AND OUTSTANDING ON NOVEMBER 1, 1879.

STATES AND TERRITORIES.	BANKS.		CAPITAL.	BONDS.		CIRCULATION.		
	Organized.	In Liquidation.		Capital Paid In.	Bonds on Deposit.	Issued.	Redeemed.	Outstanding.
<b>MAINE.</b>								
.....	74	5	\$10,335,000	\$9,383,800	\$21,444,000	\$12,096,289	\$8,747,711	
New Hampshire.....	47	2	6,630,000	5,680,500	12,638,515	7,543,746	5,144,769	
Vermont.....	51	4	8,591,000	7,678,900	19,935,510	12,638,120	7,297,390	
Massachusetts.....	246	5	95,257,000	78,210,000	179,493,153	111,337,812	68,153,843	
Rhode Island.....	62	1	20,009,800	18,403,400	37,700,145	24,004,983	13,745,102	
Connecticut.....	88	4	25,554,920	20,674,100	50,631,940	31,981,129	18,650,811	
Eastern States.....	568	21	\$165,387,420	\$137,036,750	\$321,943,265	\$200,201,579	\$121,741,686	
<b>NEW YORK.</b>								
.....	348	62	\$36,347,160	\$58,431,550	\$181,308,055	\$126,996,835	\$54,306,220	
New Jersey.....	71	3	13,420,350	12,353,350	31,292,470	19,880,371	11,372,069	
Pennsylvania.....	260	25	55,935,540	48,228,100	116,071,045	71,946,356	44,124,689	
Delaware.....	14	.....	1,703,985	1,666,200	3,605,065	2,157,995	1,447,070	
Maryland.....	35	3	12,794,960	8,314,100	23,634,850	15,680,195	8,054,655	
Middle States.....	728	92	\$169,712,995	\$128,921,300	\$355,806,455	\$226,561,752	\$119,304,733	
<b>District of Columbia.</b>								
.....	11	5	\$1,507,000	\$1,185,000	\$3,637,500	\$2,499,116	\$1,033,384	
Virginia.....	20	12	3,045,000	2,725,850	7,747,770	5,180,008	2,567,762	
West Virginia.....	16	5	1,756,000	1,478,000	4,093,140	2,576,780	1,515,360	
North Carolina.....	19	15	2,601,000	1,983,000	4,557,510	2,549,954	1,007,556	
South Carolina.....	12	12	2,451,000	1,505,000	3,719,415	2,380,780	1,338,635	
Georgia.....	13	6	2,168,000	2,005,000	5,068,290	3,076,570	2,011,720	
Florida.....	1	1	50,000	50,000	64,900	21,100	43,800	
Alabama.....	11	1	1,608,000	1,531,000	3,794,030	1,637,217	1,486,813	
Mississippi.....	12	2	3,475,000	2,170,000	6,976,950	4,764,109	2,919,841	
Louisiana.....	11	4	1,100,000	670,000	1,750,670	1,919,675	520,995	
Texas.....	13	1	2,905,000	925,000	546,600	824,978	291,599	
Arkansas.....	5	1	9,635,500	9,489,700	19,811,935	10,757,170	9,054,765	
Kentucky.....	39	8	2,955,500	2,771,500	6,736,120	4,100,183	2,695,967	
Tennessee.....	44	24	7,000,000	2,975,000	11,441,755	9,633,408	2,608,377	
Missouri.....	279	78	\$39,176,900	\$29,895,000	\$80,392,515	\$51,286,577	\$29,005,993	
Southern States.....	279	78						

STATES AND TERRITORIES.	BANKS.		CAPITAL.	BONDS.	CIRCULATION.		
	Organized.	In Liquidation.			Issued.	Redeemed.	Outstanding.
Ohio.....	198	36	\$26,221,000	\$23,489,900	\$69,319,020	\$37,404,032	\$31,914,988
Indiana.....	116	25	13,319,500	11,906,500	36,102,075	23,866,746	12,235,329
Illinois.....	167	32	16,149,600	10,160,500	35,033,425	24,970,908	10,074,519
Michigan.....	91	13	9,223,500	6,733,000	17,734,450	11,025,105	6,719,345
Wisconsin.....	57	21	3,150,000	2,403,000	7,803,210	5,215,389	2,587,821
Iowa.....	101	28	5,677,000	4,570,000	13,138,020	8,590,039	4,547,981
Minnesota.....	39	9	4,568,700	2,770,400	7,660,840	4,839,344	2,821,496
Kansas.....	28	16	840,000	830,000	3,003,900	2,046,265	937,635
Nebraska.....	12	2	975,000	869,000	1,937,380	1,203,775	733,605
Western States.....	809	181	\$80,115,200	\$63,742,300	\$181,752,320	\$119,167,601	\$62,584,719
Nevada.....	1	1	.....	.....	\$131,700	\$193,827	\$2,873
Oregon.....	1	.....	\$250,000	\$250,000	600,900	984,000	935,200
Colorado.....	19	5	1,205,000	578,000	1,773,320	983,971	790,249
Utah.....	4	3	800,000	100,000	713,830	569,638	151,273
Idaho.....	1	.....	100,000	100,000	300,040	127,189	81,901
Montana.....	6	4	300,000	205,000	585,320	341,166	244,154
Wyoming.....	2	2	125,000	80,000	127,900	72,900	54,000
New Mexico.....	2	3	350,000	320,000	475,990	362,410	313,680
Dakota.....	3	4	205,000	160,000	593,730	66,530	142,900
Washington.....	1	1	150,000	150,000	126,000	1,500	135,000
California.....	2	2	330,000	330,000	298,100	1,100	297,000
Pacific States and Territories.....	44	13	\$3,305,000	\$2,673,000	\$5,366,630	\$2,920,201	\$2,437,429
Add for mutilated notes retired.....	.....	.....	.....	.....	.....	.....	\$599,793
Totals c'y banks.....	2,423	385	\$45,297,515	\$302,268,400	\$945,281,215	\$610,146,710	\$335,734,298
Add gold banks.....	10	3	4,000,000	1,554,000	3,096,320	1,646,200	1,447,130
Grand totals.....	2,433	388	\$49,297,515	\$303,822,400	\$948,377,535	\$611,792,910	\$337,181,418

## CHAPTER X.

## COMMERCE.

COMMERCE among the States is becoming a wide field for Congressional legislation.

## SCOPE OF THE GRANT OF POWER.

"Congress shall have power," says the Constitution, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." If the States had been left to protect themselves against the intrusion of unwelcome subjects and agencies of commerce from neighboring States, a fruitful source of controversies and disagreements would have been left unguarded. This subject is therefore fully intrusted to the sovereign power of Congress; with the practical result that, so long as Congress finds no necessity for action, the States are free to legislate as their differing interests dictate; but whenever, in the national judgment, occasion for the exercise of the national power occurs, its exercise abrogates all State laws within its scope.

Every session of Congress presents new aspects of the question, What laws may Congress pass to regulate commerce? Congress has legislated to secure humane treatment of animals on long railroad journeys; can it preserve the rights and comfort of passengers as well? It has restricted the passage of nitro-glycerine from one State to another; can it do the same as to obscene books? Can it prescribe the charges of competing railroads? Can it define the just secrecy and proper disclosure of telegrams from State to State; or authorize laying a pipe line to run petroleum from Pennsylvania oil-wells to New York city;



or pass a trade-marks law ; or enact a national factor's act, or a general commercial code ? Or must all such matters be left to State legislatures ? These are only a few of the practical inquiries of the time. When the commercial power was conferred on Congress, the States were few in number, limited in production, separated by difficult frontiers, and destitute of all the means of easy communication now in use. It is not easy to look back and discern how trivial an interest commerce among the States must have been in 1789. Now, for all purposes of wholesale distribution of products of industry, State lines have become practically obliterated. There is not one producer in a thousand, nor one wholesale dealer, who does not compete for the market of the whole region round about him, irrespective of State boundaries.

The decisions of the Supreme Court show that, under the Constitution, Congress must abstain from interference with a traffic which begins and ends within a State. Each State has, solely, the power to determine what merchandise shall be grown or manufactured, advertised or transported, sold or purchased, within her borders, and to regulate all internal commercial dealings. This right, so just, intrinsically, when the theory of our government as a union of States under one government for national purposes only is considered, and so important to the preservation of good feeling and contentment, has been sacredly respected.

#### TO WHAT AGENCIES OF COMMERCE IT EXTENDS.

But the course of decision has consistently and liberally sustained such expansion of this power as the wants of the country have demanded and the limits of the grant allow. In a limited sense, commerce means traffic, acts of buying and selling ; but the court early overstepped any such limitation. More than half a century ago, in the famous case of *Gibbons v. Ogden*,\* transportation as well as traffic was held included. The State of

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\* 9 *Wheat.* 1.

New York had conferred on the inventors of the steamboat an exclusive privilege of steam navigation in New York waters. The Supreme Court adjudged this an unconstitutional invasion of the power of Congress, which, they said, comprehends navigation within the limits of every State, and extends to all descriptions of vessels, whether propelled by sails or by steam, and whether employed in carrying passengers or merchandise. A more recent occasion for asserting the power with respect to steamboat travel arose under a law enacted by the Legislature of Louisiana about ten years ago, forbidding carriers of passengers to make any discrimination on account of color, and charging any steamboat owner with damages who should exclude colored passengers from a cabin upon pretext that it was set apart for whites. The steamer *Governor Allen*, plying between New Orleans and Vicksburg, did, however, arrange two cabins (equally good) for the two races. A colored woman passenger, excluded from the whites' cabin, notwithstanding her demand for a place in it, sued under the State law, and her complaint went up to the Supreme Court upon the sole question whether the law was not void for infringing the power of Congress to regulate commerce. The court annulled the law, and said that if the public good requires such legislation, it must come from Congress, and not from the States; for how can commerce among the States flourish if each State is at liberty to prescribe its own rules for through carriers while they are within its jurisdiction? On one side of a river a vessel would have to observe one set of rules, on the other side another set. Each State would act regardless of the interests of the others. If Louisiana may forbid passengers to be assorted in two cabins, then Mississippi may enact that they shall be so assorted; and, under these opposing laws, a steamer must stop at the boundary and change her passengers from one arrangement to the other, or else be exposed to penalty and forfeiture, in one State or the other, at every trip.\*

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\* Hall v. De Cuir, 95 U. S. 485. And see De Cuir v. Benson, 27 La. Ann. 1.

Railroads were wholly unknown when the commercial power was conferred, but decisions of later years have distinctly recognized that they are included, with this additional reason, that, independent of the commercial power, Congress has authority to keep the approach to the national capital free. As "all roads lead to Rome," so American railroads lead, many of them, to Washington. The power to maintain post-roads, taken in connection with the practice of contracting with the companies for transmission of the mails, and of declaring the roads and bridges post-roads, may also be an important auxiliary in some aspects of this question. Important regulations have been imposed by Congress upon matters of railway traffic; of which the law of 1866, punishing negligent transportation of nitroglycerine, and the law of 1873, punishing neglect and cruel treatment of live-stock while in course of transportation, are examples. Regulation of passenger travel might doubtless be assumed to a greater extent than has been done.

The same reasons which apply to railroads have led to a decision that telegraphic communication is one form of commerce. The doctrine of the court is that the powers of Congress are not confined to the instrumentalities known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and apply to new developments. They extend from the horse and his rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use. They were given to be exercised over the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to watch that intercourse among the States and the transmission of intelligence are not obstructed.\*

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\* Pensacola Tel. Co. v. Western Union Tel. Co. 96 U. S. 1.



## BEGINNING AND END OF AN ACT OF COMMERCE.

There have been decisions which distinctly consider what is the beginning and where is the ending of an act of commerce among States. Ten years ago a little steamboat named the *Daniel Ball*, running on Grand River, between Grand Rapids and Grand Haven, was prosecuted for running without a United States license, and her owners claimed that, as the termini of her trips were both in Michigan, and she did not run out of the State, she was not subject to the commercial power of Congress, and need not have a license. She was a small affair, only one hundred and twenty-three tons burden, and drawing two feet of water, and not large enough to sail upon the open waters of Lake Michigan. And Grand River is so short and insignificant a stream, that another point made in the case was that she was not plying on public navigable waters. But the court held that confining her trips within the State did not take her out of commerce among the States, if she made a business of carrying goods destined for other States, or of bringing into Michigan goods which came from other States. Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that different agencies are employed in transporting it, some acting entirely in one State, others through two or more, does not matter; to the extent in which each agency co-operates, it is subject to regulation by Congress.\* And with respect to the ending of a commercial transaction, the court has said, in cases involving validity of State laws imposing license fees on sales of goods brought into the State, that the power of Congress cannot be stopped at the exterior boundary of a State, but may enter the interior, and is capable of authorizing the sale of the articles it introduces. Commerce is intercourse; one of

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\* The *Daniel Ball*, 10 *Wall.* 458.

its most ordinary ingredients is traffic; sale is as indispensable to commerce as is importation. Congress has power not only to authorize importation, but to authorize the importer to sell; and the State cannot, by exacting a license fee, restrict the sale.\*

The exercise of the power naturally divides into three branches—protection and improvement of channels and ways of commerce, civil regulation of its persons and their business customs and methods, and punishment of offences; and the decisions recognize Congressional action in all these ways. Congress may take necessary measures over all the navigable waters of the United States which are accessible from a State other than the one in which they lie to improve and fit them for general navigation by enlargement of channels, erection of light-houses, and the like, or by prohibiting or removing obstructions, such as bridges. It may excavate and enlarge the East River channel at Hell Gate, or ordain the downfall of the Brooklyn Bridge, if necessary to secure navigation. Again, it may watch the management of commerce; it may regulate the affairs of seamen, the inspection of steam-vessels, the protection of passengers, and assume superintendence of pilots; and it undoubtedly may act upon similar matters pertaining to railroads. And, again, Congress may define and punish crimes which interfere with commerce. Wherever committed, acts which obstruct free intercommunication between the States may be made punishable under national laws. Thus it appears that Congress may promote all the forms and kinds of commercial communication between States, from the initial point of transportation to its very terminus, by the threefold power of opening channels, prescribing methods, and punishing obstructors.

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\* *Brown v. Maryland*, 12 *Wheat.* 419. Later decisions limit this doctrine to sales in original packages, and say that a State may prohibit retail trade, *e. g.*, in intoxicating liquors.

## CHAPTER XI.

## TRADE-MARKS.

It is convenient to embrace trade-marks under the general title "National Subjects," although the principal thing to be explained is that it is not a national but a State subject. The two prominent events respecting trade-marks, in recent years, have been the passage by Congress of comprehensive and systematic trade-mark laws for the whole country, and the decision of the Supreme Court that the legislation was unconstitutional. This decision, however, does not render trade-marks valueless, or deprive the subject of importance.

## HOW "EQUITY" PROTECTED TRADE-MARKS.

Long before any official registration of trade-marks was authorized, there was a well-established and tolerably efficient system for guarding them, loosely called, in popular discussion, protection by the common law. To describe it more precisely, courts of equity were accustomed to recognize a manufacturer's or dealer's exclusive right to the trade-mark he had been the first to introduce, and would give him the benefit of an injunction restraining his rivals from imitating it. A multitude of the more noted goods and wares have had the benefit of this long-known equity doctrine in suits brought independent of any statute. All sorts of articles—beverages, the "Schiedam Schnapps," the "Old London Dock" and "Club-house" gins, and the "Congress" and the "Bethesda" spring-waters; medicines, the "Ferro-phosphorated Elixir," "Vegetable Pain-killer," and "Stomach Bitters;" provisions and household supplies, "Excelsior Washing-powder," "Self-raising Flour," and "Worcester-



shire Sauce;" toilet articles, "Cocoaine" and "Balm of Thousand Flowers;" names of newspapers, hotels, and establishments like "Christy's Minstrels;" and every variety of pictured label and configured device—have been brought into court to have their names adjudged the exclusive property of their makers. A twofold reason was assigned for doing this—that the dealer, by adoption of a peculiar name or device, and unusual care in keeping his goods in high repute, had acquired a sort of property like that recognized in a manuscript or invention; and that the public were liable to be deceived and injured if led by imitation of his marks to buy other and inferior goods in mistake for his. Both these conditions must be fulfilled to gain protection from a court of equity. The mark or device must be something peculiar, arbitrary, invented for the purpose. If the dealer used common descriptive words signifying the qualities of the article, any one else might do the same. Recently a dealer in paper collars wanted the attractive parcel in the similitude of an ornamented pail, in which he packed them, adjudged his trade-mark: but the judge said no; if the shape of packages is called a trade-mark, before long some one will claim the exclusive use of brown paper and a bit of twine, and then there will be an end of retail trade.\* Again, the courts would not go further than the public interest dictated. Unless the average buyer was liable to be deceived by the imitation, each dealer would be allowed to go on in his own way. Trials of causes like these were known long before any statutes; and they have always attracted no little attention in the court-rooms from the display of the samples of the rival goods, and their showy wrappers and odd labels, produced by the opposing lawyers.

#### USING ONE'S OWN NAME.

Any business house which becomes successful and famous is

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\* *Harrington v. Libby*, 14 *Blatchf.* 128.

apt to incur competition from rivals carrying on the same business under the same name. One easily recalls many an enterprise whose career was embarrassed in this way. Day & Martin's Blacking, Rodgers's Cutlery, the Burgess Anchovy Sauce, Clark's Spool Cotton, the Howe Sewing-machine, the Decker and the Hallett & Cumston Pianos, Dr. Gouraud's Oriental Cream, Faber's Lead-pencils, Wolfe's Aromatic Schiedam Schnapps, Meneely's Bell-foundry at Troy, and many less notable enterprises have been drawn into lawsuits to frustrate an imitator of their success trading in the same name.

If the competitor assumes the name without any right to it, there is no doubt that the courts will stop him with an injunction. But suppose there are two men of the same name. There are several men of the name of Smith; cannot a second or a third Smith go into a business in which Smith No. 1 has grown famous? As to all these cases, the doctrine of the courts is, that every man has a right to the honest use of his own name in business, no matter what prestige a namesake has attained, provided he deals honestly and openly with the public; but if his ways are such as to mislead the public, if he is conducting business in a way to deceive them into supposing they are buying from his predecessor, then he may be stopped. In other words, the courts interfere largely for the protection of the community from imposture, not merely to relieve a manufacturer first in the field from competition.

The Day & Martin case shows the principle quite clearly. Charles Day and Benjamin Martin manufactured japan blacking for shoes for twenty years, and made it famous. They both died, and their executors carried on the business. A nephew of the original Day, also named Day, hunted up a man named Martin for a nominal partner, took a shop in the same street, and commenced selling a japan blacking under labels much like those of the original establishment. The court said their mode of doing business must be abandoned; young Day had a right to

manufacture and sell blacking, and to do so in the name of Day, but not in a manner indicating that it was that of the old house.\*

The Meneely Bell-foundry case shows the other side of the subject. Andrew Meneely established a factory of church bells at Troy, which was very successful. When he died, in 1851, two of his sons (one of them had been a partner with his father) carried on the establishment. This was according to the father's will. He left the business to these two sons, on condition they should pay legacies, one of which was \$3000 to their younger brother, Clinton. At the time of the father's death Clinton was a lad; but after he grew up he took a partner, and the two commenced a bell-foundry, also at Troy, under the name of Meneely & Kimberly. The other brothers sued to stop them from using the name Meneely. But the court said, No; there was no fraud, no artifice, nothing to mislead the public into supposing that the bells sold by Meneely & Kimberly were cast at the old foundry; nothing to prejudice the old firm, except that their younger brother was using his own name in his business; and this he had a right to do, notwithstanding the names and the business were the same.†

The J. Rodgers & Sons cutlery case was like the Day & Martin case, and was decided the same way. After the J. Rodgers & Sons knives grew celebrated, a Sheffield cutlery house hired some journeyman whose father's name was John Rodgers to make knives for them, which they sold as Rodgers knives. But the original house sued them and recovered damages, because there was a fraud upon the public.‡ But in the Faber lead-pencil case, which was like that of the Meneely bells, the court said it was "unfortunate" for the proprietor of the old-established business of A. W. Faber that there was another manufacturer of lead-pencils in the same city with him named J. H. Faber, but that Faber could stamp his name on his pencils.§

\* *Croft v. Day*, 7 *Beav.* 84.

† *Meneely v. Meneely*, 62 *N. Y.* 427.

‡ *Rodgers v. Nowill*, 11 *Jur.* 1030. § *Faber v. Faber*, 49 *Barb.* 358.



## FICTITIOUS NAMES.

Not less curious are some controversies which have arisen where a person has adopted a fictitious name. This, in general, is not against the law. To use two names is not in itself an offence. If it is adopted to perpetrate fraud or crime, it is an important indication of a bad motive. For innocent purposes, a person may pass by more names than one without incurring blame from the law. Writers and actors have done this to such an extent as to make it a familiar custom so far as they are concerned. They have no especial privilege, and there is no established rule that persons in other vocations may not do the same where their objects are honest. The person's usual designation is his name, and he may change it as he pleases. Concealing unlawful acts by an assumed name is another thing. Using a fictitious name cannot be called unlawful. The principle is well established in respect to changing one's name. There is a prevalent idea that an act of legislature or order of court is necessary. This is not so. This is convenient for making the change known; for giving it effect quickly; and for protecting the person from any imputation of concealment or dishonest purpose. But one may make the change himself if he will take the time and pains. Women when they marry take their husbands' names by mere custom. They are not bound to do so; sometimes they decline. Men can take new names if they like by the same simple process of signing and answering to them.

The law of the land long ago espoused the maxim "A rose by any other name would smell as sweet." If Mr. Rose prefers to be called Mr. Tulip, all he needs to do is to call himself so and induce his acquaintances to do the same. A man's name, in the view of the law, is whatever he is usually called. And so is a woman's. Therefore the post-office case which recently came before the authorities was doubtless rightly decided. The facts

were that, a long time ago, a firm was formed in New York, in the name of Allison & Hearn, to manufacture and sell a patent medicine. Allison was supposed to dwell in Brooklyn, but Hearn did not know where, and never visited him at home; the two men met daily at the New York store, and all the business was done there. The medicine was popular and the business successful. Quite recently Hearn saw announcements of the death of Dr. McAllister in Brooklyn, and, having often heard of him as a physician of note, thought he would attend the funeral. He did so; and, going forward to view the remains, was amazed to recognize the features of his partner, Allison. Then came explanations and a controversy. Mrs. McAllister, learning for the first time that her husband had been in business under another name in New York, objected to any further proceedings of the sort. Hearn claimed to wind up the business, and receive money checks and orders that might be in letters, as being the surviving partner. There is a law of Congress which authorizes the Post-office authorities to refuse delivery of letters to persons proved to be engaged in using the mails in aid of obtaining money by false pretences. Under this law, the question was argued before the department at Washington whether using the name Allison, instead of McAllister, was a false pretence which made it proper to detain the letters. No one found fault with the medicine, or complained of any fraud in the manner of carrying on the business, aside from the fictitious name; and the Post-office authorities decided that this was no offence, and that Mr. Hearn might have the letters.

There is a law of New York which, as it formerly read, authorized the Court of Common Pleas to order a man's name changed if he gained any pecuniary benefit thereby. A gentleman of unattractive cognomen applied for such an order, but could not show that any legacy had been left him, or any other money advantage was depending, and the court said it had not power to make any order, but none was needed; the applicant could make

the change himself.\*—A strange case of this kind occurred in Kansas. Mrs. Brown, of Indiana, eloped from her husband with Clark, and went to Kansas, where the two lived together as Mr. and Mrs. Clark. She was generally supposed to be his wife, and called herself, and was called, Clark. In the name of Sarah Clark she brought a suit; and the defendant objected that her true name was Brown, and she must begin over again in that name. But the court said that her name was whatever she was usually called, and she might sue as Mrs. Clark.†—There was a lady employed in the Patent-office who drew her pay in her maiden name, and a newspaper published an article commenting on the matter, and was sued for libel. The court said it was no libel; a person may do business by any name he or she chooses, and it is no reproach to publish it.‡

Therefore, when trade-mark cases have involved this feature, they are not decided against the party on the mere ground that he is not using the name of his childhood, but the question of good faith is important. Witness the Gouraud Oriental Cream case. Dr. Gouraud's original name was Trust; but he carried on business for years as a perfumer and manufacturer of cosmetics, under the pseudonym of Gouraud, and at length, in 1870, procured his name changed. His sons, who retained the name Trust, afterwards sold an Oriental Cream under the label "Dr. Gouraud's Sons." The Supreme Court said they could not use this label; their name was Trust, not Gouraud; they had the right to describe themselves as Dr. Gouraud's sons for any matter of legitimacy or identification, but not to use that designation in connection with "Oriental Cream," for the purpose of misleading buyers to suppose they were obtaining the father's preparation.§

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\* Matter of Snook, 2 *Hilt.* 566.

† Clark v. Clark, 19 *Kan.* 522.

‡ Bell v. Sun Printing, etc., Co., 42 *N. Y. Superior Ct.* 567.

§ *Gouraud v. Trust*, 6 *Thomp. & C.* 133.



## OBJECT OF REGISTRATION.

The vital point in any controversy regarding trade-marks has usually been to establish by strict proof the claimant's priority in adopting and introducing his device. If he was first in the market, and the public is liable to be deceived by defendant's imitation, the court will protect him by an injunction. But this priority is very difficult to be proved. As trade-marks grew into use and value in a gradual, indefinite way, without precaution to preserve proof of their origin, a complainant was always liable to lose his case because the defendant swore he had used the device equally long, and there were no reliable witnesses or official record by which the prior right could be shown. It was a long and difficult inquiry, in many of these cases, which of the rivals first used the disputed name or emblem. To relieve this difficulty, to supply proof of the original ownership and use, is a leading object of the trade-mark statutes. By authorizing an official registration the law enabled a manufacturer to secure a permanent legal record of the very time when he introduced his mark and of its precise form. Such statutes have been passed in England, by the legislatures of several of the States, and by Congress. They enable a dealer, when he first adopts a trade-mark, to register it as his own; and, having done this, he can at any time appeal to the public record to establish his priority of design. Conversely, any one proposing to adopt a trade-mark can ascertain from the record whether the same design has been appropriated.

Provisions have been added to registration enabling an injured dealer to recover damages, and imposing fine and imprisonment on fraudulent imitators.

## THE ACT OF CONGRESS.

The first national law in regard to trade-marks appeared in 1870, as one chapter in a newly enacted revision of all the laws

pertaining to patents and copyrights. This juxtaposition of subjects gave the impression that the law rested upon the power of Congress to secure to authors and inventors the exclusive right to their respective writings and discoveries. A subsequent act imposed severe punishments upon fraudulent imitators of registered marks. Persons prosecuted under this law contested the constitutionality of such legislation, denying that in adopting a trade-mark a dealer acts either as author or inventor. Answer was made that a trade-mark pertains to commerce, and that Congress has power to regulate commerce. But the Supreme Court said that it cannot be deemed a writing or discovery so as to justify including it in the Patent and Copyright laws; and that to call the law a regulation of commerce it ought to be confined to commerce among the different States (which it was not); for Congress cannot regulate domestic trade of a single State. So they held the law for punishment of infringers unconstitutional, and annulled the prosecutions.\*

The Supreme Court decision is understood to defeat prosecutions for penalties, and to deprive United States courts of the power to grant injunctions, at least when both parties reside in the same State. But State courts will entertain these suits as freely as ever; and whoever sues in a State court will probably find that the registration of his mark at Washington will answer as proof that he designed and used it earlier than his competitor. It will not have the support and force of law, but it will be of service to show that he was first. It will be just as competent as old advertisements, account-books, and letters, or recollections of witnesses, to prove priority, and more persuasive and convincing. And upon proof of priority the complainant may have a very helpful and efficient decree from a State court, with or without the aid of State statutes.

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\* *United States v. Steffens*, 16 *Pat. Off. Gaz.* 999.

## TRADE-MARK TREATIES.

Throughout the discussion above described, suggestions were made that the treaty-making power may sustain a law of Congress protecting trade-marks. During the past ten or twelve years our government has negotiated treaties with several European powers, assuring their subjects a measure of protection for their labels on goods sent to this country. Some of these compacts do not call for any legislation here. Thus the treaties with Germany and Russia (1874) declare only that citizens of each country shall enjoy in the other the same protection as natives of the latter have. This does not oblige America to maintain any law; if she does not protect natives, she need not protect foreigners. Yet to take this position is making rather a poor and mortifying return, if our people are enjoying any substantial privilege abroad. Treaties with other nations—Austria, Belgium (1875), and France—involve a different principle. They strictly forbid the people of either country from counterfeiting the (duly registered) trade-marks of manufactures from the other, through whatever term of years the trade-mark is valid at home; and they give to the merchant injured by the imitation the same action for damages in the country where the counterfeiting is committed that he would have if he were a citizen there. There is a recent treaty with Great Britain which is different from others. It says that the subjects or citizens of each party “shall have in the dominions and possessions of the other the same rights as belong to native subjects or citizens, or as are now granted, or may hereafter be granted, to the subjects and citizens of the most favored nation, in everything relating to property in trade-marks and trade-labels,” but must fulfil the formalities required by the laws of the respective countries.

If Congress cannot maintain a trade-marks act of some limited sort, what becomes of these treaties? They are nugatory so far as securing any protection to export trade from this country



is concerned. Under the treaty rule that an American trade-mark shall be respected—in France, for instance—so long as it is exclusively enjoyed at home, if it is not protected by any national law at home can it claim any privilege in France? State laws can hardly affect this question; they will not be uniform: the treaties contemplate a national law. Yet it will be a new discovery in constitutional law that the President and Senate can, by making a treaty, enlarge the power of Congress to legislate affecting internal affairs. If such a doctrine could be admitted, many knotty problems would be solved. Slavery might have been abolished by negotiating a treaty with Great Britain that each nation would prohibit slavery in its dominions, followed by a law of Congress to carry it into effect. A uniform marriage and divorce law might be attained by a treaty with some friendly power, prescribing a rule for both countries, followed by an act of Congress to impose the treaty system on all the States. Evidently, any legislation which rests on treaties must run within very narrow limits. Perhaps those limits will be found to be that Congress can legislate to enforce treaties for protection, in this country, of trade-marks of foreign manufacturers and merchants; and then that Americans can indirectly gain a benefit, in some instances, by co-operative arrangements with houses abroad for the sale of their goods here under foreign trade-marks. But these are questions of the future.

## CHAPTER XII.

## THE METRIC SYSTEM.

## HOW IT WAS DEvised.

PUTTING a girdle around the earth may not seem a necessary preliminary for developing a new mode of measurements, yet this is what was done to obtain a basis for the metric system. One object in devising a new scheme was to secure a standard unit which should be superior to all changes, which should never, by any complication in human affairs, be altered or lost. As to the old, familiar English measures, such as barleycorn, foot, grain, pennyweight, and others which seem to have been taken from common things as standards, no one knows how far they were, formerly, from the real equivalents of the things they name; but it is quite certain there is no correspondence now; the length of a man's foot or the weight of a penny is no guide in ascertaining length or gravity. French scientists, in the closing years of last century, devised the plan of measuring a line on the surface of the earth sufficiently long and definite to afford a permanent standard. The line selected was the meridian; that is, a direct line from the equator to the north pole, passing through Paris. About one ninth part of this quadrant was most elaborately and precisely measured, and thus data were obtained for computing the whole length; and one ten millionth of the whole was selected as a unit from which all measures should be deduced, and was christened the metre—the chief or universal measure. The philosophers considered that if mankind should ever lose all correct foot-rules and steelyards, or if suspicion should arise that changes were creeping in, error could be detected and accuracy restored by measuring the meridian again. As

the equator is an imaginary line, and the north pole an inaccessible spot, this scheme for obtaining a unit reproducible with certainty seems questionable, especially as any second measurement might vary from the first by reason of improvements in methods and instruments. And so the result has proved; for some remeasurements made in recent years have modified the original result about 4000 feet on the quarter circumference, and falsified the metre as adopted and in use by about  $\frac{1}{208}$  of an inch. But this, though it somewhat disturbed the theory, has not upset the system. Practically, therefore, the metre is the length of a certain platinum bar constructed to be equal to one ten millionth part of the earth's quadrant passing through Paris, and kept as a standard in the Palais des Archives in that city. As thousands of copies have been made in utmost possible conformity to the original bar, and are everywhere in use, a permanent, unchangeable unit is practically secured; and earth can "bulge" a little along that line, if she wishes, without doing the metric system any harm.

#### ITS PRACTICAL ADVANTAGES.

Another advantage desired was that the easiest possible mode of reckoning in weights and measures should be attained. For this purpose a decimal division has been adopted throughout. Americans are so familiar with the convenience of this principle in our national coinage that it should be at once understood in its application to measurements. Thus, reckoning upwards, or towards larger measures,

Ten metres make a deca-metre,  
Ten deca-metres make a hecto-metre,  
Ten hecto-metres make a kilo-metre.

And, reckoning downwards, or towards smaller measures,

One tenth of a metre is a deci-metre,  
One tenth of a deci-metre is a centi-metre,  
One tenth of a centi-metre is a milli-metre.



The same decimal principle runs throughout the extension of the system to surfaces, solids, weights, etc.

Another advantage desired was to attain facility in reducing measurements of one kind to the corresponding expression in another; computing weights, for instance, from known solid contents. For this purpose the metre is carried out as the basis of all forms. All measures of length are tens or tenths of the metre. Measures of surface and of solid capacity are formed by employing linear measures in two or three directions, on the same principle as the superficial or solid foot is formed by measuring off a linear foot in two directions or in three. For weight, a cube of water measuring one centimetre in each dimension is taken as a theoretical unit, called one gram, or gramme; and multiples or aliquot parts of this, computed by tens, give the various measures of weight. The principle is further extended to the various kinds of measurement employed in the applied sciences, until a complete set of the tables seems like a complicated maze; but great ease and rapidity are the result in all the varied and difficult computations of scientific men.

A fourth advantage desired was the adoption of a common, uniform system. This is less important in this country—where the old-fashioned English tables have been very uniformly used throughout the States—than in Europe, where each nation, and often each little principality and canton, had its different system before the metric was adopted. Thus, a foot (*Fuss*) in Hesse-Darmstadt was less than ten inches, in Prussia a little more than twelve, and in Schwarzburg-Rudolstadt just above fifteen, and in other German States it varied between these limits.

According to President Barnard, no less than three hundred and ninety-one pound weights have been in use at different places in past times. Three hundred and seventy of these have been abandoned upon acceptance of the metric system. The metric system seeks to abolish confusion and uncertainty, and to harmonize the business of mankind upon one common system

of weights and measures. It was designed for uniform use throughout the civilized world. It is steadily gaining favor. An international convention, held in 1875, secured its acceptance so extensively that adoption everywhere seems to be only a question of time. In this country it was authorized, though not made obligatory, by act of Congress in 1866, which provided that standards should be prepared by the national government at Washington and furnished to the States. Many of the departmental bureaus and offices have voluntarily taken it. Scientific men, engineers, surveyors, and others use it extensively for private computations and in papers to be interchanged with each other, and will welcome the time when it is understood among tradesmen and workmen.\*

#### THE CENTAL SYSTEM.

The cental system imitates the metric in employing decimal gradations; but is limited to merchandise of the bulkier kinds, such as have been sold by the bushel or gallon. Two important changes are implied in adopting it—dealing by weight and reckoning decimally. The familiar, old-fashioned system of selling the grains by bulk has steadily fallen into disfavor, in recent years, under the influence of the important fact that weight is a much truer indication of the value of grain. A bushel of first-

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\* The metric system has been adopted by the United States Marine Hospital Service in all its departments; by the vital statisticians of New York, Boston, and other leading cities; and by a large number of State and County medical societies—among them the State Medical Societies of Pennsylvania, Rhode Island, New York, Georgia, and Kansas, the Medical Societies of the Counties of New York and Kings, and the American Medical Association—most of which bodies have recommended the use of it in papers and reprints, by medical boards, hospitals, and dispensaries, in describing and recording cases, by the faculties of colleges in instruction, and by physicians and druggists. In short, the medical profession in this country has pretty uniformly given its adhesion to the metric movement.—*N. Y. Times*, April 9, 1880.

quality wheat will weigh several pounds more than one of inferior grade, owing to the superior compactness or density of the kernels. The same principle applies to many other kinds of produce. If they are to be graded and sold according to value, this must be done by some system of selling by weight. So long as the sales are by measure, the buyer can have little assurance as to the quality he receives, but must depend upon warranties or inspection of samples. Moreover, carriers prefer to charge by weight; freights are usually computed by pounds or tons. The variations in the number of pounds which constitute a bushel in different localities cause perplexity also. In New York and in some other States, for example, the law gives thirty-two pounds to each bushel of oats; but some other States are not as generous—perhaps because, in fact, not more than thirty pounds will ordinarily go into a bushel measure. Consequently the system of *measuring* grain seems absurd, if its *weight* is to be regarded at all; and it brings much extra labor upon commission merchants. Numerous liquids, as syrups, oils, etc., vary much in weight, according to their quality, in some articles the better quality being lighter, and in others heavier; and it seems as reasonable to buy and sell them by the pound, as well as potatoes, eggs, etc., as it is sugar, coffee, and rice. Upon this view, the merchants in Produce Exchanges of many of the cities have advised the plan that sales shall be made by the hundred pounds, instead of by the bushel. The adoption of decimal reckoning is a natural and easy consequence; a pound, ten pounds, a hundred pounds (or cental), a thousand pounds, will be the quantities in which sales will usually be made.



## CHAPTER XIII.

## ADMIRALTY JURISDICTION.

## ITS NATURE.

EVERY reader upon legal topics understands that all commercial nations have acknowledged a general system of "maritime law," and have employed courts of "admiralty jurisdiction" to administer it; that this law and these courts deal with controversies arising out of the management of *ships*, the carriage and delivery of *cargoes*, the employment and treatment of *seamen*, the award of damages for *collisions* between vessels, or of compensation for *salvage* of vessels in peril of wreck, the condemnation and sale of ships captured as *prize* of war, and the punishment of *crimes on board ship*. All jurisdiction of this nature was by our Constitution reserved from the States, and vested, by general language, in the courts of the Union. The manner in which the scope of this jurisdiction has grown to meet the wants of growing American commerce forms a good illustration of the expansibility of our jurisprudence, and shows that if the law is administered in the future in the same spirit as has prevailed in the past, traditions and precedents may guide and advise, but cannot restrict, progress.

Admiralty, as has been said, deals with matters arising "at sea." But what constitutes the sea, and what are its limits and bounds? Is the mouth of the Hudson or of the Mississippi a part of the sea? If so, how far up stream is "sea?" If not, how far out into the blue waters is "river?" Goods are laden on board ship in a foreign land to come to an American port, and they are to be protected for their owner by the admiralty (*or district*) court while they are at sea, and by the common-

law (or State) court after they are brought ashore. But when do they cease to be "at sea?" Is it when the vessel enters the pilotage grounds of the port? or when she is fairly within the sheltered harbor? or when she is fast moored? or not until the goods are piled upon the solid wharf or pier?

#### EXTENSION TO ALL NAVIGABLE WATERS.

The leading test for determining these questions, in early English times, was the ebb and flow of the tide. There was a long-continued and deep prejudice against the admiralty; and, as England had no important interior commerce, and the tidal line corresponded quite nearly with the actual wants and uses of her people in commercial matters, that line was easily made the dividing line between the rival courts, with the modification that admiralty should not interfere, tide or no tide, with matters occurring within the legal bounds of an English county. There is an antique caricature representing the petty disputes that in old times engrossed English tribunals on this subject by exhibiting a common-law lawyer, armed with a mace, running back and forth along the sea-side, defending his jurisdiction from the incursions of an admiralty lawyer who floats in a tub upon the water brandishing a trident. One can easily imagine that as the tide rises, the tub is borne in to high-water mark, and the jurisdiction of the admiralty lawyer is in the ascendant. As it falls, the common-law practitioner can push his competitor backwards with the receding waves, until he can flourish the mace over the entire moist beach above low water.

For two thirds of the century our courts followed, without much question, the view of admiralty which prevailed in England, and treated the word "admiralty" in the Constitution as meaning only that jurisdiction, limited to tide-waters, which was implied by it in old English law. There were no early reasons of importance impressing a different view. But, in later years, the increase of navigation and all allied interests upon the great

lakes and the rivers at points above the rise of the tide, together with the advance and development of all forms of commerce upon the various waters connecting the States, have demanded an entire reconsideration of the subject. The year 1845 may be deemed the salient era of the change. An act of Congress passed in that year, asserting admiralty jurisdiction over the lakes and navigable waters connecting them, and a decision of the Supreme Court announced in 1846, but founded on facts occurring earlier, introduced the view that our admiralty jurisdiction is not necessarily that recognized in England when our Constitution was framed, but the broader one known in commercial countries elsewhere. This idea has been developed by subsequent adjudications, until it is now understood that (with limited exceptions of matters arising within the internal commerce of a single State) the question whether any particular waters are within the American admiralty jurisdiction or not depends upon whether they are *navigable*, not upon their susceptibility to the tide; the jurisdiction may extend, as has been happily said, "wherever ships float and navigation successfully aids commerce."\*

The result of the advanced opinion is that the term admiralty, as used in the Constitution, is not necessarily to be construed as subject to all the restrictions imposed upon it in English jurisprudence at the time when the Constitution was framed, but the grant confers general admiralty powers; that it is in no respect limited to the high seas, or dependent upon the ebb and flow of tides, or the bounds of counties, but extends over all waters of the United States which are actually navigable, whether found so by their original character, or made so by artificial improvement; and that, thus construed, it embraces not only all torts committed upon them, but also all contracts which are to be executed upon them, or relate to maritime services and transactions.

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\* *The Hine v. Trevor*, 4 Wall. 555, 563. See *Exp. Easton*, 95 U. S. 68.



## TITLE TO BEDS OF STREAMS.

There is a parallel question relative to the rights of land-owners upon shores of streams. By an ancient rule of English law, the proprietors of land upon the banks of petty streams are understood to own the land under the water, each to the middle of the stream, to an imaginary thread running up and down half-way between its banks. But if the stream is navigable, the property of the land-owner terminates at the water-line; the bed of the stream, with the waters, is public. In England, as with reference to admiralty jurisdiction so with reference to land-titles, a stream was deemed navigable and public as far up as the tide ebbcd and flowed. Beyond this point, or if there was no tide, it was deemed private. Now this is a question which, in America, each State settles for itself, and not one which, like admiralty jurisdiction, can be determined for the whole country by the United States Supreme Court. And the States are not agreed. The courts of most of the New England States and of Mississippi and Virginia have followed the old rule. New York, Pennsylvania, and several of the Southern States have adopted the rule that if the river is actually navigable for purposes of commerce, it must be treated as public, whether tidal or not.\* The West is divided on the question. Some States have had no occasion yet to consider it. But the probability is that ultimately, in all the States where there are any important navigable streams which are not tidal, the tide will be discarded, and actual navigability substituted as the test of the extent of the right of shore-owners.

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\*The Supreme Court has commended this view in *Barney v. Keokuk*, 94 *U. S.* 324.

## CHAPTER XIV.

## BANKRUPTCY.

PREVIOUS to the passage of the Bankrupt law, a merchant who failed in business was liable to be greatly harassed by the pressing demands and suits of rival creditors, and for long years to be excluded from resuming business by the peril that any acquisitions he might make would be seized by those who held old claims—a peril which both disheartened him in exertion and discouraged those who might be willing to give him assistance and credit. The creditors, being independent in proceedings to collect their dues, each endeavored to anticipate the others; and numerous anecdotes are current of ingenious devices of attorneys to outstrip one another in the race of diligence. There is the story of one who “attached” the water-wheel of a factory whose proprietors would not pay his demand. In another anecdote, four attorneys in pursuit of the same debtor reached the railroad terminus late at night, and three, by concert, to exclude the other, hired the only cab in sight, intending to belate the fourth by compelling him to walk. The latter jumped on the box, bought the cab and horse from the driver, drove to a choice spot, and upset the vehicle with its door against a stone wall, and then ran forward and served his writ while his competitors were extricating themselves from their unexpected dilemma. So an absconding debtor who undertook to escape across a lake on skates, bearing the proceeds of his fraudulent sales in a fat pocket-book, was followed and overtaken by a collecting agent, also upon skates; and when the unlucky fugitive broke through the ice, the collector insisted on his throwing out the pocket-book to pay demands in full before he would help him ashore.

Upon the other hand, the pressure of creditors often impelled debtors to schemes of fraud or of unjust preference in paying rival claimants.

In view of these tendencies of the ordinary laws for collection of debts, the Constitution has authorized Congress to establish uniform laws upon the subject of bankruptcies. Precisely what is a "bankrupt law" has been the subject of some conflicting discussion. But, practically, it is understood to be a law that ascertains what persons have, from lack of means, become unable to pay their debts in the ordinary course of business; that takes their remaining property into legal custody, and distributes it equitably among those who are proved to have just demands; and that gives the debtor, except in such few cases as are excluded from the benefit, a discharge from his past debts, assuring him of immunity from further lawsuits to collect them.

In 1800, and again in 1841, laws of this description were enacted under stress of general commercial trouble then existing; but each was, within two or three years, repealed. In 1867 a comprehensive and well-considered bankrupt law was passed. In 1878 it was repealed, with an exception, however, of all cases commenced under it prior to September 1 of that year. The present condition of affairs, therefore, is that no new application for the benefit of the bankrupt law can be entertained; but proceedings commenced before the repeal are being completed; and there are many persons in the community holding discharges granted under the law which forever protect them from their creditors. A very brief statement of the nature of bankruptcy proceedings will satisfy any present interest in the subject.

Under such a law as was in force from 1867 to 1878, and still governs in protecting discharged debtors, the petition of a debtor to be discharged as a bankrupt, or the petition of his creditors for a surrender of his estate, brings up, in the first instance, the question whether the debtor is really a bankrupt, and within the provisions of the law. If the debtor is the petitioner,



there is not much opportunity for question upon this point: but when creditors make the application, they must prove that the debtor has committed some "act of bankruptcy;" that he has absconded or concealed himself, or has concealed or disposed of or assigned his property to defraud his creditors; or has been arrested or imprisoned for debt for at least a week; or has allowed one creditor in preference to others to obtain judgment against him or to seize his property; or has suspended payment of ordinary business paper for a fortnight. Such acts as these expose a person to be thrown into bankruptcy by a creditor.

After an adjudication that the debtor is a bankrupt, an assignee is appointed, generally upon a choice by the creditors, to take and dispose of the debtor's estate. The debtor is required to furnish schedules or lists of all his property, also of all his debts, and may be strictly examined upon oath as to all the facts. The assignee takes possession of the property, sells it, defrays any specific charges or liens that ought to be paid in full, and collects the proceeds to be distributed among the creditors. To enable him to do this, very full powers are given him to take the place of the bankrupt in all matters connected with his property, and to prosecute any suits which the bankrupt might have done if the surrender had not been made.

Meantime an opportunity is accorded to the creditors to make proof of their demands. Each one must file a statement and make oath, and, if his claim is disputed, must adduce proof that it is lawful. The questions how much is due, at what date, what interest is to be allowed, what offsets should be made, and the like, are all determined. The money realized by the assignee is then paid over by him to the creditors. The general rule is to distribute the fund among the creditors in proportion to their demands proved. But the expenses of the proceedings, and some demands, such as debts to the United States or to the State in which the proceedings are held, taxes, and

wages recently earned, to the amount of \$50, are allowed to be paid in full before ordinary debts.

The ultimate step in the proceedings is to grant the debtor a discharge. This may be refused him if he has been guilty of misconduct, such as giving false testimony, withholding his property from the assignee, falsifying his accounts, or giving portions of his estate to particular creditors to buy their consent to a discharge. And there are some restrictions applicable where a debtor's property fails to pay more than a specified portion of his debts. The discharge does not extend to debts incurred by embezzlement, or positive fraud, or breach of trust. But, with these exceptions, one main purpose of the law is to set the bankrupt free from indebtedness, that he may commence business life anew.

## CHAPTER XV.

## THE CALIFORNIA LAND CLAIMS.

BETWEEN the California of Dana's "Two Years Before the Mast" and that of Nordhoff's recent volumes, how great is the difference! A third part of a century has seen an immense wilderness become a flourishing and influential State. The course of this transformation threw upon the United States judiciary the burden of determining a conglomeration of controversies fully as complex, novel, and pressing as any which the history of jurisprudence discloses—the "private land claims."

## HOW THE CLAIMS AROSE.

It was about a month after our Declaration of Independence that, by a royal order of the government of Spain, provinces of Mexico which included California were organized as "the Internal Provinces of New Spain." From that time until 1847—the date of the transfer of California to the United States, upon the close of our war with Mexico, closely followed, in 1848, by the discovery of gold—the province was under a succession of Spanish and Mexican governments, whose policy was to make liberal grants of land to persons who would engage to settle upon and cultivate the tracts given them. This was done for the purpose of attracting immigrants. Immense quantities—eleven square leagues being a usual limit—were granted without exacting any payment, upon simple conditions that the settler should occupy, build upon, and cultivate his acquisition.

By the treaty which transferred California from Mexico to the United States, our government engaged to recognize and *protect the rights* of these settlers; not only of those who had



fully performed all conditions and had received full papers of title to their lands, but also of those who, by any circumstances, ought to be allowed to continue incomplete or delayed improvements, and to acquire lands which had thus been promised them.

At the time of the treaty an immense number of these claims existed. In some cases the settler had died, and there were claims of his heirs to be considered; in others, he had sold his claim, and the purchaser demanded to fulfil the conditions and take the title in his place; or he had commenced building and cultivation, but had delayed completing what was prescribed; or he had been prevented from so doing, notwithstanding his best efforts; or he had neglected and abandoned his grant altogether; or he had lost his papers. The claims involved questions of all sorts; but the United States agreed to take the place of Mexico in regard to the lands, to recognize and respect such equitable claims as had their origin in the action of the Mexican government, but were yet inchoate and imperfect, and to take such steps as were needed to perfect them, just as if the sovereignty of the country had continued unchanged.

The ink of this treaty was hardly dry when the discovery of gold aroused intense interest in those wild lands. Claims that had been neglected were revived; settlements that had been abandoned were renewed. All kinds of reasons were brought forward to excuse the delay of grantees in taking possession and cultivating as they had engaged. False claims were advanced, and spurious records and papers were prepared to support them. There arose very rapidly a large mass of extensive and difficult claims, pressed with the utmost zeal.

#### THE COMMISSION.

Under these circumstances, Congress, in 1851, created a board of commissioners who should try and determine these claims, under review by the United States courts; and this complicated and difficult task has been, during the past quarter of a century,

quietly and successfully accomplished. The extent and scope of the governors' powers, under the old laws of Spain and Mexico, to make these grants, have been ascertained, and the date when their power ceased has been determined. Of course, all grants made in excess of their authority, or after it expired, have been adjudged valueless. The validity of each grant has been examined—whether the papers were genuine, whether they were regular in form and duly signed. The conditions imposed upon the grantee have received attention, and the claimant has been required to show by some proper proof that the grantee took possession, that he built and cultivated as was required, or to show some excuse. Claims which could not be substantiated have been forever annulled, while all which would bear a judicial investigation have been formally confirmed; and complete and final evidences of title have been issued to the claimants.

In this affair, the number and variety of the claims, the extent of the tracts of land involved, their remoteness from the seat of government and settled portions of our country, the difficulty of obtaining evidence in that wilderness, the novelty and obscurity of the questions involved, and the value placed upon the lands since their sudden appreciation have combined to render the task of judicial determination one of unusual complexity and magnitude.

## CHAPTER XVI.

## POLYGAMY.

## THE ANTI-BIGAMY LAW OF 1862.

PRIOR to 1862, it would have been difficult to show that polygamy in Utah was unlawful. Every State had its law against having two wives; but in the Territory of Utah plural marriage had plausible claims to be deemed a peculiar institution, not a crime. In that year Congress enacted such a law, which did not, indeed, name polygamy or mention Utah, but announced a punishment for the commission of bigamy within any of the Territories. Probably Utah was prominently meant, but that Territory was not particularized; the theory of the law was that the plurality of wives there tolerated was merely the common, vulgar crime of bigamy, and might be punished just as marrying two or more wives has always been punishable in any State. Theoretically it made Mormon husbands amenable to fine and imprisonment. Practically it was for years a dead letter; obstacles, for the time insuperable, prevented its enforcement.

## OBSTACLE NO. 1 TO ITS ENFORCEMENT.

The first obstacle to be removed was that civil government in the Territory was in those years in the hands of the Mormon priesthood. There was a Territorial government emanating from Congress; but it was a shell. Brigham Young was the Territorial governor; the hierarchy practically controlled the whole administration of civil affairs, and effectively influenced whatever military rule was attempted. It was about 1870, under the brief but efficient governorship of General Shaffer, the first successor



of Young, that reasonable independence of the United States Territorial government began to be really established.

#### OBSTACLE NO. 2.

A second obstacle lay in the resolute, unanimous spirit of resistance to the law of 1862 as unconstitutional. The Mormons claimed polygamy as a tenet of their religion, and sought shelter for it under that clause of the Constitution which declares Congress shall make no law prohibiting the free exercise of religion. So strong and influential was this belief that Judge McKean, when initiating some years ago earnest proceedings to repress plural marriages, preferred to found them on a Territorial statute for the punishment of lewd conduct rather than on the disputed act of Congress. And it is stated, and is probably true, that the test case which was decided sustaining this national law was arranged by consent. So confident was Mormonism of prevailing upon the constitutional question that George Reynolds, a young and enthusiastic partisan, submitted to be convicted in the Territorial court, expecting a triumphant reversal at Washington. He appealed to the Supreme Court, and his counsel argued that, even conceding Congress may prohibit and punish having several wives in Territories where it is done in isolated cases, and as mere matter of licentious misconduct, they cannot do so in Utah, for there plurality of wives is a tenet of the Mormon religion, authorized by the sacred books of the people, and believed in as divinely approved; and the Constitution says that Congress shall pass no law prohibiting the free exercise of religion. The court decided against such a claim, saying that history shows very clearly that this constitutional provision was never intended to forbid laws punishing immoral or pernicious conduct, but only those which restrain opinion, belief, or worship. It appears that the Constitution was first prepared without containing any such provision, but four of the States desired to have one inserted. One of these was Virginia, and she, only

three or four years previous, had adopted a like rule for her own legislature, expressed in much fuller terms; declaring that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty;" and that "it is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." This was drafted for Virginia by Thomas Jefferson, who was also a leader in the successful effort to have the amendment inserted in the Federal Constitution; and there is a speech of his on record which argues that the legislative powers of government reach actions only, and not opinions, and shows that he understood the constitutional provision as meaning the same, in effect, as the Virginia law. Rightly understood, it does not shelter vicious or injurious conduct or practices merely because called religious.

The decision establishes upon a firm foundation the power of civil government, as exercised in this country, to restrict or forbid dangerous immoralities, or abuses, or cruelties which threaten the public welfare, or the peace and happiness of other persons, notwithstanding they may be practised under the ingenious pretext of religious observances. It also swept away irreversibly that difficulty in enforcing the anti-bigamy law caused by doubt of its validity. Probably additional support for the decision might be found in the consideration that the prohibition upon laws of Congress restrictive of free exercise of religion, upon which the Mormons relied, is found among amendments passed at the instance of the States before questions of governing Territories had come up for settlement; and that they ought to be considered as regulating legislation over the States only, leaving Congress clothed with supreme legislative power—with all legislative power, that is, which a republican government can claim and wield—over Territories acquired from time to time by ces-

sions of unorganized country. However this may be, the validity of the law is established by the highest authority known to our institutions.\*

OBSTACLE NO. 3.

Meantime an independent course of events relieved, partially at least, another obstacle—the difficulty of obtaining juries uncommitted to acquit. The Supreme Court (in 1871) decided that, until Congress should prescribe another mode, juries in a Territory must be drawn according to a Territorial law. The old Territorial jury law of Utah was so framed that, upon a trial for bigamy, the jury was sure to embrace polygamists, or persons resolutely unfriendly to a conviction. Recently a new procedure for impanelling has been adopted. It is said to have been derived from the laws of California, and to have been passed by the Territorial legislature without perceiving that it would enable the Federal District Attorney, by challenges and claiming appointment of triers, to exclude, on the ground of partiality, any polygamist from sitting as a juror to try an indictment for bigamy. But such is now claimed to be its effect. And this branch of the subject is obviously fully under Congressional control.

OBSTACLE NO. 4.

A fourth obstacle has been the difficulty of procuring such evidence of the second or later marriage as the law requires to sustain a prosecution. The general law as to bigamy requires that two actual marriages should be proved. General reputation of marriage is not enough. When a grocer or a dry-goods dealer sues the husband on a bill of goods ordered by his wife, evidence that the pair are living as married is sufficient on that point. Not so on a criminal trial; there the actual marriage must be proved. Persons who were present at each wedding are ordinarily sought for as necessary witnesses, and many a pros-

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\*Reynolds v. United States, 98 U. S. 145.



ecution fails for want of some legal proof of both marriages. In one trial the prisoner was shown to have wedded three ladies successively. No. 1 had lived after the marriage to No. 2, but had died before the marriage to No. 3. But the indictment was founded upon the third marriage only; the second was not made a basis of complaint—it was, perhaps, outlawed. And the judge ruled that the prisoner must be acquitted; the second marriage was no marriage, since the prisoner had a wife living at the time; hence it did not forbid him to make the third. Thus strict has the law been in requiring an actual marriage to be proved. And as long as this rule is maintained in Utah it practically prevents convictions, by the flat refusal of all participants in the forbidden weddings to give any testimony about them. The ceremonies of “sealing” have been conducted in Endowment House, Mormons only present, and these under oath, and what they deemed high obligations of religion and patriotism, to preserve strict secrecy. But this is only a judicial rule of evidence. No constitutional right is involved. The requirement of proof, like the composition of juries, is under the control of Congress. An enactment that the ceremony of marriage need not be proved, but that maintaining several wives as such should be evidence of bigamy, would abrogate the obstacle to the enforcement of the law. At the opening of the session of 1879–80, three measures adverse to polygamy were under advisement in Congress: to propose an amendment to the Constitution prohibiting it throughout the country; to disfranchise polygamists; to dispense with the rigorous rule of evidence.



### III.

## STATE SUBJECTS.

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#### CHAPTER XVII.

#### MARRIAGE.

GRAVE and increasing inconvenience is found to arise from the conflict of the laws of the States regulating the mode of contracting marriages.

#### NECESSITY OF A CEREMONY.

An important point on which the laws differ is the necessity of any formal wedding ceremonies. In one State, actual, present consent of parties to become husband and wife, carried into effect, is a valid marriage, and any description of proof is received to establish it: forms and ceremonies are absolutely unimportant. In another State, there must be a license; in another, a wedding before an officer; in another, a record; and there is further subdivision among the States in the manner of enforcing prescribed formalities—whether the marriage is defective, or only a penalty incurred.

For example, when Mrs. Bissell sued Mr. B. for divorce, about ten years ago, in New York State, he declared that he had never been married to her. "Yes he has," said she. "We were riding in a carriage one day. We had been engaged to be married on that very day. He gave me a ring, and said, 'This is your wedding-ring; we are married; I will live with you and take care



of you all my life as my wife.' I took it for a wedding-ring, and went to live with him as his wife." And she proved that, at the boarding-house where they lived, he introduced her and paid her board as his wife. The court held this to be a valid marriage.\* In another instance a man deluded a Brooklyn servant-girl by a mock wedding, bringing a crony to personate a priest, who read a marriage-service. When prosecuted for bigamy, he pleaded, No priest, therefore no marriage. But the judges said that if there was an actual agreement there was a real marriage; a clergyman was needless; and that the law of New York is so liberal that men of that stamp have need to be careful, or they may "blunder into bigamy."† And in Missouri, in a lawsuit by grandchildren to recover property belonging to their grandfather, the story of his marriage was that no clergyman or justice was called, but the happy pair stood up in the boarding-house parlor one evening, and told the lady's relatives and the boarders that they had decided to be married persons; after which they behaved as such. The court said that was enough, so far as the grandchildren's rights were concerned.‡

Quite the contrary was decided in Maryland, where one of these marriages without a ceremony, and only by words of present contract, was questioned. The court said it was void; that by the law of Maryland some official ceremony must be super-added to the parties' contract.§ An Oregon lady once claimed a share of a deceased man's estate as his widow. She could not show that he had ever taken out a marriage-license, so she declared they were married by private contract one time when they were taking a sea voyage, and where there was no law commanding a license. The court, without professing to doubt the lady's word, said that the story was not sufficient, if true; that

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\* *Bissell v. Bissell*, 55 *Barb.* 325.

† *Hayes v. People*, 15 *Abb. Pr.* 163; and 25 *N. Y.* 390.

‡ *Dyer v. Brannock*, 66 *Mo.* 391; and 2 *Mo. App.* 432.

§ *Denison v. Denison*, 35 *Md.* 361.

by the law of California and Oregon parties cannot become married except by consent avowed before an authorized officer and in the presence of two witnesses; that persons who will not procure a license must stay single; they cannot escape the law by going out in a boat just beyond the boundary and having a wedding there.\*

There is a multitude of stories in the law reports of cases such as the above.

#### EFFECT OF REMOVALS.

A strong argument can be made in favor of each of these conflicting views. Either would seem to be better for the country at large than the perpetual conflict between them which is at present witnessed, especially in instances where persons married in a State of liberal laws remove into a strict one. If the New York or Missouri couples above mentioned go to live in Maryland or California, are they respectable married persons or not?

In past years the courts have, upon principles of comity, recognized marriages which were valid where contracted as valid everywhere. This has been a necessary concession, and explains how the confusion in the laws has not produced intolerable confusion in life. Imagine the feelings of married couples while travelling, if the tie between each pair were deemed lawful or immoral according as it conformed to or contravened the laws of the State through which they happened to be passing. Imagine the consequences to morality if a New York husband could escape marital obligations by removing to Connecticut or New Jersey, where, perhaps, some preliminary or ceremony might be necessary to a marriage which he and his wife, married in New York, where it was not prescribed, did not observe. Yet such consequences might flow if the courts of each State enforced, strictly, the local law of marriage in all cases. The

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\* *Holmes v. Holmes*, 1 *Abb. U. S.* 525.

courts have felt compelled to recognize all marriages which are valid where made; and thus has grown up an awkward substitute for uniformity in the law.

This doctrine of comity by no means covers all the troublesome cases. Quite lately the Supreme Court at Washington was called upon to decide the validity of a marriage under these circumstances. A man of Pennsylvania, where, apparently, the law does not require an official wedding, travelled into Michigan, where the statute prescribes a ceremony by a justice or minister, and was there married. But the lady was an Indian girl, and the statute was disregarded. Indian forms were followed, or, perhaps, none at all. He carried his dusky bride back to Pennsylvania; they lived and acquired property in Pittsburgh; died; and when their heirs claimed their estate, the answer was made that the father and mother were never lawfully wedded. The Supreme Court administered justice in this instance by saying that, as the Michigan law did not say in so many words marriages shall be void unless celebrated by an officer, it ought to be enforced in some other way than by adjudging them void and punishing innocent posterity.\*

But this suggestion does not assist in cases where the local law does say that the marriage shall be void. An example is found in the case of marriages between a black and a white person; these are explicitly declared void and punishable by the laws of several States, while in others they are tolerated. If, then, a couple of different color go to a State where they may lawfully wed, and are married, and then return to one where this is unlawful, what shall be done? †

#### MOCK WEDDINGS.

These explanations show the folly and danger of the make-

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\* *Meister v. Moore*, 96 *U. S.* 76.

† The embarrassments attending this class of cases are more fully explained under "Mixed Marriages" in chapter vi., on Civil Rights.



believe weddings which young people sometimes arrange for amusement. It is better to choose other kinds of play. There was once, in New Jersey, a large party of young people who went upon a pleasure excursion one afternoon and evening. They had a fine time, were very social, and grew so merry that one of them, a Miss Terry, challenged a young gentleman of the party to be married to her. He said he would. They asked an older gentleman of the party to be the minister. He assented. They stood up, the rest of the company gathered around, and they had a mock wedding. They did not know that the older gentleman was a justice of the peace, and so was authorized to marry persons in earnest, the same as a minister. And he did not know the young couple were only in joke. Two or three days afterwards they heard that the justice was going to send word of the marriage to the clerk to be recorded as a real one. Then there was trouble. The young lady's friends did not know whether she was to be considered married or not. They brought a lawsuit to have it decided. All the witnesses testified that the wedding was only in fun, and the judges said that if that were so, it was not a marriage, but Miss Terry was free to marry any one else.\* But the lawsuit cost several hundred dollars, and kept Miss Terry in perplexity for two or three years.

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\* *McClurg v. Terry*, 21 *N. J. Eq.* 225.

## CHAPTER XVIII.

### MARRIED WOMEN.

THIS chapter will not speak of marriage or divorce, but only of the rights and powers of wives. Upon this subject there have been numerous local changes rather than one comprehensive, national change. But while it is not practicable to give explanation of details which will be full and accurate for all the States, a generalized view of the scope and spirit of the new law may be presented.

#### THE OLD VIEW.

By old English law as enforced in early years throughout this country (except in Louisiana), the legal existence and rights of a wife were, for the most part, deemed merged in those of her husband; or, as the view has been quaintly put, Man and wife were one, and the man was the one. As to property, the wife continued, indeed, the owner of her lands, but the husband controlled them and their income, and her money or personal property vested at once in him; and so did the proceeds of any demand or right of action, if he would take the trouble to assert his marital right. Her services also belonged to him. She was disabled from making any contracts. He was bound to provide her with necessary support while he lived. By way of provision after his death, she enjoyed dower, being the use, for her life, of one third of his real property. In nearly all judicial proceedings affecting her, he either took her place or stood by her side with a practical control of the affair. As to any criminal acts done in his presence, she was irresponsible, and he was dealt with as the sole offender.

## NATURE OF THE CHANGE AS TO PROPERTY.

These subjects are all under the dominion of the several States. A national law prescribing a uniform rule for the whole country would not be allowable. Accordingly, while these old-fashioned views have been drawn under severe and urgent criticism all over the country for more than thirty years past, the degree of change effected has varied greatly in different regions. Some States have adhered partially to the old law, granting to the advocates of improvement only moderate alterations. Other States have in effect remodelled the relation. The change, though in the aggregate large, has been of slow growth; the increased privileges have been accorded bit by bit. Massachusetts and Maine were earliest in enacting limited laws of this character;\* other States rapidly followed the example; yet down to about 1845 the laws which had been passed were of very limited scope compared with later ones. They secured the independence, in property and business, of wives whose husbands had deserted them, restricted creditors in seizing a wife's property for her husband's debts, enabled married women to make wills, and introduced some other special reforms, but did not assert any general, extended change. Michigan, in 1844, and New York and Pennsylvania, in 1848, introduced the general principle that, notwithstanding her marriage, a woman should continue the owner of all property she had acquired, and of subsequent acquisitions, at least if they came by inheritance or by gift from others than her husband; and should enjoy independent powers of making contracts and transferring property sufficient to enable her to manage her own. Such legislation has been rapidly and extensively followed, yet in a broken and irregular way. Take Connecticut, for instance: a complete protection to married women in their rights of property against creditors

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\* Schouler's Domestic Relations, 209.



of the husband is now the established policy of the State; but this has been attained gradually and with difficulty. The first act was passed in 1845; it protected the interest of the husband in the real estate of the wife which was hers at the time of the marriage, or accrued to her by devise or inheritance during coverture. The second, in 1849, protected the personal estate which should thereafter accrue to her during her married life, by bequest or distribution, by vesting it in him as trustee for her. The third, in 1850, protected real estate conveyed to her in consideration of money or property acquired by her personal services. The fourth, also in 1850, protected reinvestments of the avails of her real estate when sold. The fifth, in 1853, vested in her, for her sole use, all her property, real and personal, when she was abandoned. The sixth, in 1855, extended the provisions of the act of 1849 to personal property owned by her at the time of marriage. The seventh, in 1856, extended the provisions of the act of 1849 to patent-rights, copyrights, pensions, and grants and allowances by government; and an eighth, in 1857, further extended it to property acquired by gift. The ninth, in 1860, extended the act of 1850 respecting property acquired by personal services to reinvestments of the same. The tenth, in 1865, extended the provisions of the act of 1845 to real estate acquired by gift or devise; and by the eleventh, in 1866, the rules of 1849 were extended and applied to all personal property, whether acquired before or after marriage. Thus the policy of protecting the wife's property from the husband's creditors was completed.\* Her rights and capacities have been further enlarged by later laws. In 1869 she was declared to be liable for business debts or notes given for benefit of the joint estate; and this law, with others passed in 1872 and 1873, made her liable to be sued upon antenuptial debts, or contracts made after marriage upon her personal credit for the benefit of herself, her fam-

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\* *Jackson v. Hubbard*, 36 Conn. 10.

ily, or her estate, and enabled her to join with her husband in suits in her behalf. Later, in 1877, her ownership of real property was continued to her, notwithstanding her marriage, and with power to make contracts or conveyances, except that her husband might have an interest as survivor; and, as to personal property, husbands were made trustees for their wives. Last of all, in 1878, all property thereafter acquired by any married woman was declared to be held by her for her sole and separate use. There are additional laws upon minor and collateral points. Not all the States have proceeded in this reform by so many distinct steps, but many have moved very gradually. Yet, while the method has been irregular, the results have been extended and thorough.

#### HOW THE LAW NOW STANDS.

Reviewing the various State laws passed down to about 1879, and disregarding details and minor differences, the general rule is that a good degree of independence is accorded to married women in respect to their estate. In nearly three quarters of the States, a woman, when marrying, retains all her property; and may, notwithstanding her marriage, acquire more, though not from her husband, lest his creditors should be defrauded. Some of the States, in declaring this principle, say that her property shall not be subject to her husband's debts, but go no further; they do not deprive him of control of it. Several of the courts have said that they will administer the old law except as far as the new one has distinctly changed it; and where such a statute prevails, it may be that the husband can, though his creditors cannot, have the collection and benefit of rents from his wife's lands. But other States go further, and call whatever a wife owns "her separate property;" and others further yet, and say very explicitly that it shall be free from his control or disposal. Thus her ownership of property is almost everywhere assured, and very generally her control of it. Moreover, she has, by laws of a majority of the States, large powers of making contracts relative

to her property; of selling and transferring it, and of suing and being sued in respect to it. These powers are, however, subject to some limits and qualifications which vary in different parts of the country. Moreover, the States which have not fully acceded to these principles have introduced limited reforms and special systems of law upon the subject;\* so that the old English doctrine of the husband's acquiring the wife's personal property, the rents and profits of her lands, and the right to collect securities belonging to her is practically abrogated throughout the country.

#### AN IMPORTANT QUALIFICATION.

It is an important qualification of the modern doctrine of separate property of married women that a woman who desires the benefit of the rule must keep her property reasonably separate. Three of the States (Arkansas, Florida, and Oregon) require an inventory or schedule to be filed in some public office, enumerating the property which the wife asserts to be her own. And even then she is liable, on general grounds of common-sense, to lose her property by carelessly allowing the public to believe it is her husband's. Any one is liable to lose property by allowing it to become so intermingled with that of another person that it cannot be separated; or by permitting another person to obtain credit on the strength of being supposed to own it; and the fact that the other person is one's husband makes no difference. Numerous stories are narrated showing that ladies have not always understood this, but have supposed the law would preserve their property for them without any watchfulness on their part. It does not; it merely enables

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\* Louisiana did not adopt the old English law. The view there has always been that marriage was, as to property, a kind of partnership under the husband's management; and that, on a dissolution, each should receive back what he or she contributed, while acquisitions made during the marriage should be divided. Substantially this view prevails also in Texas, *California*, and Nevada.



them to preserve it.—There was a married lady in Illinois who bought a lot and commenced to have a house built upon it; but she neglected to have the deed recorded, and thus her husband was able to appear as if he were the owner, and no one could ascertain the contrary. He employed a painter to paint the house, who did the work, supposing the husband was the owner. But he could not collect his pay from the husband, and the wife refused it, because, she said, she did not order the work, or authorize her husband to do so. The painter then applied to the court to have the house sold, and his work paid for out of the price, and the court said this might be done.\* By neglecting to put her deed on record, the wife had enabled the husband to get credit on the appearance of being the owner; and, as the work had increased the value, the property ought to pay, if the owners would not.—In Mississippi, a lady of wealth who had married a poor man gave him money for the purchase of a large plantation. He took the deed in his own name, to which she made no objection, because she supposed that as she had supplied the money the law would give her the property at any time. He managed the estate for about fifteen years, during which he became heavily in debt, and at length his creditors took measures to have the plantation sold for their payment. The wife applied to the court to forbid this; and she produced proof that the land had been bought with her money. But the court said that the creditors were right. After allowing her husband to run in debt to persons who supposed from the deed that he was owner, she could not be allowed to defeat their claims by showing that she was. She should have taken the deed in her name. Two similar cases in New Jersey have been decided in the same way.—There was once, in New York, a glass-factory that was owned equally between Mr. Hitchins and Mrs. Douglas, and the two carried on the business of making glassware in partnership. At

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\* *Anderson v. Armstead*, 69 Ill. 452.

length Mr. Hitchins sold out his half-interest in the property and business to Mrs. Douglas. The deed was made out in her name; but the business was from that time carried on by her husband. Signs were put up in his name, "W. W. Douglas," and in that name orders were given and drafts signed. She did not appear in the concern, and there were no indications to warn creditors that she claimed to be owner. At length the husband was sued on some of his drafts, and then the couple endeavored to escape having the stock seized by showing that it belonged to the wife, and that the husband had run the factory as her agent. But the court said this would not do; it would clearly be defrauding the creditors.\*—Again, there was a married lady who kept a store for some years in New York city, employing her husband to manage it. At length she sold out to him, and he continued it really for his own account. They did not advertise the change; and he bought goods from time to time of merchants who supposed he was still buying as agent. At length some of these merchants, failing to get their pay from the "agent," sued the lady, and then the facts came to light. The court said she must pay.†

It is true that some cases of the same general nature have not resulted so unfortunately. There was a lady in Georgia whose father gave her a very valuable watch. Her husband one day asked her to loan it to him for a few days; and she did so, knowing that he wished to raise some money upon it. He pawned it for \$150, saying nothing about its being his wife's, and the money-lender supposed it was his own. The husband also signed a paper saying that if he did not repay the money on the day appointed, the money-lender might sell the watch without giving him any notice. He did not pay, and the lender had the watch sold at auction. This was without the wife's

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\* *Hamilton v. Douglas*, 46 *N. Y.* 218.

† *Bodine v. Killeen*, 53 *N. Y.* 93.

knowledge; when she learned the facts, she sued the buyer of the watch. The court decided he must give up the watch or pay the worth of it. The woman had made her husband an agent to pawn the watch, but not to sign a paper waiving notice of sale. This was beyond his authority; and so, as the general rule is that a money-lender must give notice in such cases, the sale was null and void.\*—There was an instance in Indiana where a mill which belonged to a husband and wife was burned. A mill was much needed in the neighborhood, and the citizens were willing to make a donation towards rebuilding. But the husband owed some debts, and, in order that the citizens should not lose the benefit of the arrangement by his creditors seizing the property, they gave the money on condition that the wife should be the owner. She, however, employed her husband as miller; and on that pretence the creditors claimed the mill as his. The court decided against them.† And there have been several instances where the wife has owned the farm or the factory or the store, and has employed her husband to work in the business; but if the deed, and the signs, and the mode of doing business and signing papers have made it plain to the public that he was not the owner, the courts have said that his debts could not be collected from the property.

Thus a full-phrased married-woman's law enables a wife to keep her property by the same care, prudence, and good management as other owners must use. She may employ her husband as her overseer, agent, or clerk, and she will be injured in consequence of what he says or does no more than if he were some stranger, but no less. She must take the same care to avoid complications in the business management, to prevent her property from being intermixed with his, to forbid concealments and misrepresentations, and, above all, to prevent his obtaining credit on the supposition that he is owner of what she has put in his

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\* *Van Arsdale v. Joiner*, 44 *Ga.* 173.    † *Cooper v. Ham*, 49 *Ind.* 393.



charge, as any other owner of an estate or business is required to do with respect to the assistants whom he employs.

#### BUSINESS DEALINGS.

While many of the States have gone no further in this reform than to assure a wife of the continued enjoyment of her property, others have conferred additional powers. Several of the legislatures have said that she may be capable of engaging in trade and business, may buy and sell goods, give notes, employ agents and laborers, and retain the profits, or be alone responsible for losses. Other States, considering this too much power to confer, have said that she may work for an employer and retain the wages. It is not always to be understood, however, that laws of this description deprive the husband of his right to the society and services of the wife according to the old law of marriage. The intention may be only to impart capacity as far as third persons are concerned. Under the old-fashioned law a wife could not well prosecute business even if her husband consented; for dealers would not give her credit, because she could not be legally bound; and if her customers or employers would not pay her, she had no right of lawsuit to compel them. The chief effect of the new law, in any given State, may be only to remedy this incapacity, so that when a married woman has earned wages or sold goods, her employer or customer shall not escape paying her; or when she has made a bad bargain she shall not escape paying if she has property. It does not follow that, as between her and her husband, the law entitles her to decline cares of housekeeping, or withdraw her aid from her husband in his affairs, in order to gain time for an independent business of her own. By the old law a husband had the right to the services of the wife, though he never had any very direct way of enforcing it; and this right and the wife's corresponding duty remain generally unchanged as between the two. The new laws are designed to bear upon third persons, and to

apply where the husband has given consent to the wife devoting time to employments away from home, or where he has abandoned her, leaving her dependent on her own exertions, rather than to diminish the duty of the wife to reciprocate by her society and services where she receives society and support from her husband.

This general understanding that a wife's services are unqualifiedly and without compensation due to her husband in return for a bare support may undoubtedly lead to hardship and injustice in occasional instances; and this point is one which the reforms in the law have not yet reached. The case of Miss Everett or Mrs. Ridgeway\* may be mentioned as a striking example. It occurred some twenty-five years ago; but there has not been any definite change in the rules of law under which it was decided. It would probably be adjudged in the same way now. In 1821 Miss Everett and James Ridgeway were married. She supposed that he was single. He had, in fact, been previously married, but had been separated from his wife for some years, and may perhaps have believed her dead. However that may have been, she very soon appeared upon the scene, and sued for a divorce. It was, of course, decreed. According to the law of that day, this divorce did not entitle Ridgeway to marry again. Miss Everett, however, did not understand this, perhaps Ridgeway did not; and after the divorce they were married a second time. Later the legislature passed a new set of laws which changed the wording of the divorce law in such manner as would apparently give Ridgeway a better right to marry than he had under the law in force when he was divorced; therefore, by way of utmost precaution, the pair were married a third time. This was after the commencement of 1830. They then lived happily together until 1847, when Ridgeway died.

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\* *Cropsey v. Ogden*, 11 N. Y. 228; *Cropsey v. Sweeny*, 27 Barb. 310; 7 Abb. Pr. 129.

Meantime they had twelve children, eight of whom lived to grow up. When they were first married, Ridgeway was a common carpenter, worth not more than \$1000. The (supposed) wife not only took all the customary care of the household and children, but took in work to defray expenses, and also co-operated efficiently with her husband in his business undertakings. At the time of his death he was worth \$150,000, which result was undisputedly due even more to her prudence, economy, and sagacity in managing his affairs, than to his labor. She then, in the name of Mrs. Ridgeway, sued for dower in his real property, but was astounded when his children and grandchildren by the wife who had procured the divorce, and by a still earlier wife of whom she had never before heard, disputed all three of her wedding-, claimed that they were entitled as heirs-at-law to all Ridgeway's property, and denied that she and her children had any share in it. And the courts decided in their favor, saying that she and Ridgeway had been mistaken in supposing that the divorce enabled him to marry again under either the old law or the new; that all three weddings were void; and that she was not a wife, and could not claim dower. She then sued, now dropping the name of Ridgeway, for some compensation for her life-long services. She showed all that she had done, by unusual labor and skill to aid her (supposed) husband in accumulating the property he had left; and claimed that she should be paid something as housekeeper and general assistant in the business. But the court said she had evidently rendered all her services under the belief that she was Ridgeway's wife. If she had been, he would have been entitled to her best service without any obligation for payment. It was not possible, therefore, even by fiction of law, to decide as if there had been a contract to pay. Judges often imagine a promise to pay where a real one cannot be proved; but this could not be done in the present case, because the circumstances disproved any promise to pay. She therefore lost the labor of her



whole active life, under operation of the rule which entitles the husband to the wife's service. An unusual case, doubtless, but a very hard one.

#### BUYING NECESSARIES.

One sometimes wonders whether the time-honored privilege of married ladies to go a-shopping at their husbands' charge will one day fall before the advances of law reform. The chief changes in the law, thus far, have been in behalf of wives, not of husbands. The old rules were, many of them, distinctly reciprocal; yet the rights and privileges of the husband have been, by successive laws, much diminished, without any corresponding reduction in his duties and responsibilities. The breeze of improvement has not blown strongly in the direction of the man as yet. Judges have not been quite agreed upon the reason of allowing a wife to go a-shopping and have the bill sent to her husband. One view has been that by the marriage he constitutes her his agent to buy goods. Yet this is not quite satisfactory, for a consequence would seem to be that he could at any time forbid any further purchases by her, which is not quite the law. If he refuses, for no fault of hers, to provide for her, she can buy necessities at his expense, notwithstanding his prohibition; and this seems more than agency. Another reason given has been that, by the marriage relation, the husband engrosses all the wife's own means of support; and unless he is compelled to provide for her, there will be naught for her to live upon. If this is the reason, it is losing force; for, as has been explained, in a majority of the States a wife retains all her property rights: marriage does not increase a husband's means. And in many of them, law and public sentiment and general custom have much diminished his distinct claim to her services, and have given her an authority and right to do business and earn money for herself. Yet the courts have not yet considered this change as a legal reason why she may not go a-shopping as she used to do. Practically, there is a good deal of modification. The wives of

the period keep their own money, and defray their own expenses from separate property, much more than our mothers and grandmothers could. But the rule of law does not appear to have been modified that a husband is liable for necessities furnished to his wife. If, indeed, he is willing to provide for her wants at his home, no one can assume to do so elsewhere; if she has left him voluntarily or causelessly, he may refuse payment. In other circumstances, he must pay for necessary things she orders.

Many questions are raised as to what things are necessities; and these are more difficult of answer because there is not one uniform rule for all persons, but the amount allowed varies with the condition in life, previous habits, and general style of living of the parties, the husband's wealth, and other circumstances. In a case that was recently tried in Maine,\* the lady took her little child and went to Europe on quite an extended pleasure-trip, and the husband's lawyer objected that pleasure-travel abroad could not be deemed necessary. The judge refused to decide this, and said it was for the jury to say whether, taking into view the means of the husband, and the health of the wife and child, they would allow the expenses of such a journey.

Jewelry has been brought in question in several cases. There was a case in Massachusetts,† not many years ago, where the wife bought a gold chain and locket and a gold watch and chain, valued in all at about \$175. The husband argued that the things bought were not necessities, only ornaments; but the court said that ornaments such as were appropriate and proper to a lady's station in life, and to her husband's position and means, might be allowed if the jury thought right; the rule is not confined to shelter, food, and clothing needed to sustain life. Then the jewellers offered witnesses to testify that the husband kept a fast horse for pleasure-driving, and wore diamonds. The court said

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\* *Thorpe v. Shapleigh*, 67 *Me.* 235.

† *Raynes v. Bennett*, 114 *Mass.* 424.

this was lawful evidence, for it tended to show the husband's means and station. When a man marries, he engages to support his wife according to his social condition and wealth; and if these enable him to keep a horse and wear diamonds, they may well make it necessary that she should have some moderate ornaments.

The more interesting and important question as to a new bonnet arose in a Georgia case\* a few years ago. Mrs. Sulter ordered a hat of a certain style and trimmings; but when one was sent home to her by the milliner, she refused to take it because it was "a botch." The price of the hat was \$12.50, and the milliner sued Mr. Sulter. He proved that Mrs. S. had a good supply of hats already, and had no need for a new one; and that, in fact, she did not order this one for herself, but intended it as a present for a female friend. The court said he was justified in refusing to pay for it. A hat might be necessary to a lady herself, but making presents to one's friends was not necessary. But how about Christmas, New-year's, and birthday presents? If a lady in good society orders little things for these, can her husband refuse to pay the bill?

In Connecticut, a wife and daughter disagreed (apparently) with the husband and father in denominational preferences, and the wife took a pew for the two in the Episcopal church. When the church sued the husband for pew-rent, the judges said it was not allowable.† And in Massachusetts the husband and wife disagreed as to schools of medical practice, and she employed a clairvoyant doctress to attend upon her. The clairvoyant sued the husband; but the court said the law does not recognize the dreams, visions, or revelations of a woman in a mesmeric sleep as necessities for a wife for which a husband can be compelled to pay; they are fancy articles for which a

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\* *Sulter v. Mustin*, 50 *Ga.* 242.

† *St. John's Parish v. Bronson*, 40 *Conn.* 75.



lady who has money of her own may pay, if she pleases, but she cannot have them charged to her husband.\*

It is quite clear that one who should sell intoxicating liquors or preparations of opium to a married woman accustomed to taking them to excess could not recover the price from the husband. What is practically more important to know is, that the husband may turn around and sue the merchant for damaging his wife's constitution and health. A New York lady† was addicted to taking laudanum to excess; and the druggist sold it to her secretly, and notwithstanding he knew she was undermining her health by use of it. The court held that the husband could recover damages from the druggist in fault for loss of his wife's society and service, and for the expenses of her cure.

#### DOWER AND ITS DECLINE.

The really essential idea of dower, as long maintained in this country, has been that a married man should not dispose of his real property so as to deprive his wife of her support from it, in case she survives him, without her consent. Is this ancient right upon the decline? There is not, certainly, any positive disease. But doctors sometimes report cases of death from old age, or a general breaking up of the system. Dower is very old, and there is, in many of the States, a breaking up of the system of property rights incident to marriage, out of which it was born. Perhaps it is destined to perish.

In ancient English times there were five different kinds of dower. Only one was robust enough to bear the voyage with our colonial ancestors to this country; and, of the other four, three have died in England. There was, for instance, "dower at the church door," where the bridegroom, or sometimes his father, paused on the church door-step, after the wedding, and proclaimed aloud which of the family lands should be the dower

\* *Wood v. O'Kelley*, 8 *Cush.* 406.

† *Hoard v. Peck*, 56 *Barb.* 202.

of the bride. And dower, by-the-way, is a very different thing (just the reverse, in truth) from the dowry of a bride. Her dowry is the money or property she brings to her husband. This, in most parts of our country, is no longer known; she keeps her own, notwithstanding the marriage. Her dower is the provision secured to her, out of his lands, after his decease. Then, again, there was "dower of the fairest," where, instead of a third part of all the husband's lands, select portions of the best and choicest were her right. But these have been abolished for a generation in England, and probably were never recognized in America. Dower here has been the simple right of a widow to have the use, for her life, of one third of any landed property which, during the marriage, the husband owned.

The important feature of this right was that the courts would protect it against any sale of the husband in which the wife did not join. Giving a wife one third use of what lands her husband owns at his death is not the full idea of dower; the vital point is that he cannot, during lifetime, part with his lands except subject to her right. Under the long-established rule, a married man could not sell his farm without his wife joined in the deed, declaring that she relinquished her dower; or if he did, and he died before her, the purchaser was liable to have to move out of one third, or pay her rent for it. Every one knew this, and the courts had several maxims—as, that the law would favor dower, and, that dower was a moral right as well as a legal one—according to which they would set aside deeds by husbands to save the rights of widows.

Not many years ago, in Michigan, there was a gentleman bearing the romantic name of Brown, a widower, with several children, and proprietor of a hotel and grounds known as the Mason House. He courted a second wife, who supposed, all along, that he continued the owner of the hotel. But, in fact, two days before their wedding he made a deed of the hotel to his children; and this deed he and the children concealed. In about a year

he died; and the widow then found that, instead of having her dower in the hotel property, she, if the deed should be sustained, was to have nothing, the children by the first wife claiming the whole. She applied to the Supreme Court; and the decision was that the deed was void, and she should have her dower.\* For, although Brown had a legal right, up to the very hour of the wedding, to deed away the hotel, if he did so openly, and gave her an opportunity to decide whether or not to marry him notwithstanding, yet his doing so secretly was a fraud upon her which the court would not allow.

At the present day, however, the States seem to be gradually changing this feature of the law which prevents a husband from deeding his lands while he lives. This does not affect the legal provision for a widow out of her husband's property. It is not the policy of giving a widow a share of the real property her husband leaves which is declining, but the rule that the married man shall not sell his lands without his wife's consent.

From a cursory examination of the laws in force in 1878, it seems that neither the name nor the substance of dower is now known in nine of the States, but the law simply declares what share of a man's estate his widow shall receive. California, Colorado, Indiana, Louisiana, Nevada, and Texas, also Kansas and Oregon apparently, either never recognized the right of dower or have abolished it, and Mississippi retains but a part. Five more States have abolished the important substance, though they retain the name. In Connecticut, Georgia, Iowa, Tennessee, and Vermont, the word dower is retained; but the law is so far changed that the right does not interfere with selling and deeding. There is no need of a wife's joining when the husband sells his farm or house; her dower attaches only when he dies and to what he then owned. Under this system dower is only a name for a wife's share of what property her husband leaves;

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\* *Brown v. Bronson*, 35 *Mich.* 415.



not a protection during his lifetime. The remaining twenty-five States keep up the old system; unless a wife has joined in her husband's deed, or in some manner consented to his conveyance, she has a third interest, for her life, in all the real property which he really owned at any time during the marriage.

## MARITAL COERCION.

The origin of the old-fashioned rule of the courts forbidding a wife to be punished for a criminal act committed in her husband's presence is obscure. Evidently, its conservative supporters cannot deduce it, like other views of the subjection of woman in matrimony, from the account of events given in Genesis: it would not be easy to acquit Eve of the larceny of that apple, on the ground of "marital coercion." Some more recent origin of the doctrine must be accepted. It is one quite germane to the institutions attributed to Alfred, under which the hundreds were held responsible for good order among the tithings, the tithings were charged with the behavior of heads of families, and heads of families with whatever took place in their several households. But the rule cannot be traced as far back as to Alfred. It can scarcely be thought to rest upon any general belief among English judges that when a man and wife unite in an offence, the wife is, in most cases, compelled. On this point the views of that worthy jurist, Bumble, B., are as judicious and sensible as they are emphatic. They stand reported in the case of *Oliver Twist*, in which Brownlow argued that the husband is the more guilty of the two in the eye of the law; for the law supposes that a wife acts under her husband's direction. "If the law supposes that," said Bumble, "the law is an ass—an idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is that his eye may be opened by experience." There is not sufficient actual probability of coercion to sustain the rule. The most probable explanation of its origin is that which connects it with benefit

of clergy. It is well known that during a long period in English history the criminal courts could not or would not inflict the death penalty upon a priest. Whoever was found guilty of a felony might claim the immunity of a clergyman. The test of his being entitled was to show him a book, usually the opening lines of the Latin version of the 51st Psalm, and if he could read these, the announcement was made in court, "He reads as a clergyman." And then he was, in the earliest times, delivered to the ecclesiastical authorities; in later years dismissed, after a trivial punishment. This usage, originating in deference towards the spiritual courts, was maintained, long after those courts lost their supremacy, to temper the severity of the criminal law. In those days, when nearly two hundred different offences were nominally punishable with death, courts and juries were liberal in devising fictions to ameliorate the administration of the law. One case is narrated\* where a culprit was proved to have stolen a pair of pantaloons, and the jury insisted on rendering a verdict of "Guilty of manslaughter." Manslaughter in stealing pantaloons! Yes; for the punishment for larceny would be death, while on a verdict of manslaughter only a brief imprisonment could be imposed. Grave judges were not averse to theories which might temper the statute law. Benefit of clergy was one of the most prominent of these fictions employed for avoiding capital punishments. But when cases occurred in which man and wife were put on trial, and the man claimed his clergy, what, then, should be done with the woman? It was too absurd to discharge her as being a priest, and too shocking to discharge him and punish her. Apparently, the judges recurred to traditional decisions in which wives were acquitted because their acts were really done under compulsion, and upon these constructed a fiction of marital coercion, in virtue of which they

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\* There is a current story to this effect; it has not been traced to any authoritative report.

might have a way open, when a husband secured an escape from capital punishment by claiming clergy, for vouchsafing a like privilege to his wife tried with him.

In the administration of justice at the present day, little is seen of the application of this rule. Without having been everywhere distinctly abrogated, it is fading away. Modern authorities are not agreed on any list of offences to which it shall be extended. Treason and murder have quite generally been excluded for their heinousness, and misdemeanors on account of their veniality. According to some books, stealing is, at the present day, almost the only crime to which the rule applies. Numerous exceptions have been admitted, and writers are pretty well agreed that there is no absolute, peremptory right of a wife to be discharged because her husband was present when she committed the offence; but the District Attorney may prove that she acted voluntarily, and then she may be convicted. In one case where the wife set fire to the house when her husband was present, but he was a bedridden cripple; and in another where she wrote a threatening letter, sealed it, and gave it to him to deliver, which he did, not knowing the contents, the courts held that there was no opportunity for imputing coercion, but the women were punishable.

Similar common-sense rules have been applied in prosecutions for keeping a liquor-saloon contrary to law, and some analogous offences in which the idea of coercion is especially preposterous. In many of the States, moreover, the rule is believed to have been in effect abolished; not always, to be sure, by specific repeal, but sometimes by the enactment of systems or penal codes which supersede the common law and do not contain the rule of marital coercion. A penal code which passed the New York Legislature in the spring of 1879 contained a repeal of the rule; the governor's disapproval, however, prevented the code from becoming law.



## CHAPTER XIX.

## DIVORCE.

THE subject of divorce is embarrassed by many most serious difficulties, even when the law of one jurisdiction only is under consideration. These difficulties are not new, and they are generally known. Abuses not so familiarly understood have arisen in recent years out of the conflict of the laws of different States.

## HOW THE DIVORCE LAWS CONFLICT.

The philosophers have a riddle, If an irresistible body should strike an immovable body, what would happen? This collision happens not unfrequently in the administration of the divorce laws in New York courts. The immovable body is the New York law as to the grounds of divorce. That State has long and inflexibly adhered to what is considered to be the New-Testament rule, that only the absolute violation of the marriage vow can justify a dissolution of the bond of marriage; and even for this the injured party only is set free; the offender stands (for the time being at least) prohibited from a remarriage. From this position the State cannot be moved. No agitation, arguments, or efforts have sufficed to induce her legislature or courts to relax this doctrine, so far as inhabitants of the State are concerned. Nor is New York the only State of strict law. South Carolina refuses divorce entirely. In different degrees several States maintain the marriage-tie very firmly. But other States recognize lesser grounds as sufficient for even a complete divorce. Cruelty, desertion, insanity, even incompatibility, are, in different jurisdictions, allowed as grounds for a judgment divorcing a married pair, and setting each at liberty to remarry. Generally

speaking, in the history of the country, newly settled regions have been more liberal in allowing divorces, and gradually have introduced stricter laws as civilization has become established. At the present time extremes of freedom are seen in laws of Dakota Territory, which allow divorce for cruelty, a wife slandering her husband being an example; and of Utah, which caps the climax by according it "whenever it is made to appear that the parties cannot live in peace and union." Now if South Carolina or New York were left to herself, she would enforce her chosen policy within her own territory by simply disregarding decrees made in the laxer States. But the Federal Constitution is considered to preclude this. The framers of the national Constitution included a provision requiring the courts of each State to give "full faith and credit" to the judgments of courts of other States. From this provision, which has been beneficial as respects ordinary money judgments, a concealed mischief has been developed in its application to judgments of divorce. A judgment rendered in one State must be respected in the courts of another, even though they themselves never would have rendered such a one. Hence a decree of divorce lawfully obtained in another State is, under the Constitution, an irresistible body; and whatever the policy and legislation of New York, for instance, may be as to allowing divorces, when a decree from a court of another State comes before the New York courts, the Constitution requires them to respect and enforce it; that is, provided it has been lawfully and honestly obtained.

It is the conflict between these two principles of law which gives rise to so much difficulty over foreign divorces. If the question of allowing a divorce for cruelty, desertion, or intemperance should arise between inhabitants of New York, and be brought before her courts in a fresh suit, the local law is established; a complete divorce cannot be given. If the question arises in another State between persons dwelling there, and the courts of that State, according to its laws, grant the divorce,

and that decree is afterwards questioned in New York, the Constitution is equally explicit—the ground must be deemed sufficient, and the decree treated as valid. There is a large debatable region including a third class of cases—divorces obtained in a lax State to be used in a strict one. A discontented husband or unhappy wife living in New York who cannot obtain a divorce there, for want of sufficient grounds, seeks it under the easier system of some other State. A lawyer concocts proofs of some nominal residence, and contrives a pseudo-service of summons. The defendant is never informed of the suit, and makes no defence. All earnest investigation of the real facts is evaded. And the decree thus obtained, although resting on grounds which the law of New York repudiates, is proffered in the courts there as a judgment of another State which must be respected. After contest and litigation in a dozen or more cases, the rule has become settled that, unless the decree obtained in another State is founded on a true residence in that State for the time required by its laws, and on an actual, honest service of summons, it is good for nothing in New York. Her courts will respect genuine divorces adjudged in other States in honestly contested lawsuits between persons there living, although for causes New York denies; but will disregard a “bogus” one obtained by a New-Yorker on a journey, and by means of an advertised summons. In other words, the courts have decided, as respects a decree obtained by a non-resident, and without giving the defendant notice and a hearing, that it is not such a judgment as the Constitution means, and need not have full faith and credit in other States. But a judgment rendered anywhere in favor of a resident and on a hearing is enforced everywhere. Hence have arisen woful confusion and uncertainty; and the lax States have been enabled, in great measure, to foist their peculiar laws upon the strict ones.



"BOGUS" DIVORCES.

Thus far has been presented only one aspect of the subject, the question of statesmanship, whether this conflict of laws ought to be maintained. Another aspect is of more immediate interest—the opportunity which this condition of the law has afforded for frauds in obtaining "bogus" divorces. A divorce procured without giving to the defendant honest, lawful notice of the suit is a fraud not only on the defendant, but on the plaintiff in whose behalf it is procured. It is of no legal efficacy. It accomplishes nothing but to cheat the client out of a fee, and perhaps lead him or her into disaster and disgrace.

A variety of ingenious devices have been employed to give a nominal but useless notice. In one case a New-Yorker carried his wife with him upon a pleasure-trip to San Francisco, and while there arranged with her that she should return home before him. He escorted her on board the steamer (it was before the days of the Union Pacific Railroad), and, just as the steamer started, the wife was presented with a beautiful bouquet of flowers. The husband kissed her good-bye and rushed ashore. Nestling in the bosom of the bouquet was a little farewell note. How romantic! She opened it as the steamer swept along the bay to read the farewell message. It was a summons in a suit for divorce. And while she was helplessly involved in the long sea-voyage, the husband, on shore, filed an affidavit of the companion who brought the flowers, to a personal service of the summons, and obtained a divorce by default. But when the wife's side of the story was made known to the courts, the false judgment was indignantly swept away. As the husband was a knowing party to the fraud, he had only himself to blame. But many persons, in recent years, have suffered from employing "divorce lawyers" who have, by means of such tricks, procured and received a fee for a divorce which appeared correct on paper,

but was valueless in law by reason of his evading the requirement to serve a summons.

#### THE UTAH VARIETY.

In former years these fictitious divorces came to New York courts in numbers from Connecticut, Illinois, and Indiana. More recently the laws of these States have been modified, or are more strictly enforced. And for the past few years the most noticeable supply of these devices has come from Utah Territory. There have been many cases of persons brought to mortification or punishment by marrying a second time in reliance on a Utah divorce from a former spouse. What recent improvement in the laws of that Territory may have taken place is not to the present purpose. For a long time they have been shamefully lax, and probably many years must pass before the Eastern courts will cease to be vexed by the appearance of the decrees sold, as freely as were indulgences in the days of Luther, by the Probate courts of Utah from 1874 till 1878. An early statute of the Territory—ratified, as respects the jurisdiction of the courts, by an act of Congress in 1874—allowed any Probate Court to entertain a suit for a divorce brought by any person who would swear that he or she was a resident of the Territory, or wished to become one; and to grant a divorce for either of several causes mentioned, among which was this broad scoop-net for everybody's petition: "When it is made to appear that the parties cannot live in peace and union together, and that their welfare requires a separation." And by another statute the summons issued to give defendant notice of the suit need not be delivered personally, if the defendant is not a resident of the Territory; publishing it four times in a newspaper of the Territory, and mailing a copy to defendant's last known address, is sufficient. Under this system, ingenious and unscrupulous attorneys have been easily able to defraud both their clients and the defendants by palming off upon them a fictitious divorce.

There was Nungasser's case. He was arraigned\* before a police-justice on a charge of abandoning his wife. "What have you to say, Nungasser?" asked the justice; "this woman is your wife, is she not?"—"She was my wife once, but I got a divorce."—"Where did you get the divorce?"—"In Salt Lake City, Utah." And the prisoner handed up a document, purporting to be a decree of divorce granted by the Probate Court in Utah, Hon. Elias Smith, Judge. The justice, after perusing it, inquired of Nungasser if he had ever lived or been in Utah. "No, sir," was the answer.—"Then I am sorry to say I cannot recognize this decree," said the justice. "Were you not aware that it was good for nothing in this State?"—"No, Judge; I thought it was all right." But the justice, with stolid disregard of the authority and seal of Utah, sent the defendant to prison until he should give bail to maintain his wife.

Take the Hoyt case.\* The parties had been married for some ten years. The wife became discontented. Rumor says that she had formed another attachment, and desired leave from the law to make another marriage. The law of New York rigorously said "No." The divorce lawyer cajoled her to believe she could obtain a permission in Utah which New York must respect. Following his counsels, she signified to her husband that she desired to make a visit to her parents. He gave his approval, and she affected to start. Whither she went is perhaps not known. Subsequent disclosures showed that the journey was a fiction, a ruse for commencing her proceedings to obtain a divorce from Utah. As already explained, she had only to make oath that she *desired* to reside in Utah, and that she felt it impossible to live longer in peace and union with her husband. Her attorney made the formal publication of her summons, and quite likely the husband one day received a Utah newspaper, wondered who sent it, glanced through it without seeing anything marked, and

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\* As narrated in the newspapers.



threw it aside. The nominal suit went forward, a decree was made, and the proceedings culminated in a letter to the husband apprising him that his wife had obtained a divorce and had married again. Not satisfied to let matters rest thus, the husband consulted his lawyer, and was advised that the Utah divorce, not being founded upon any residence of the wife, or any service of process giving him actual notice, was void in New York. He therefore sued in New York for a divorce. In his suit, brought to trial not long ago, the marriage or other relation between the lady and the husband's successor in her affections was proved as a ground, the Utah divorce was brushed aside, and a New York decree was granted in the husband's favor. Observe what confusion and uncertainty these proceedings introduce into the social relations of these parties. Among the lady's friends she is esteemed lawfully divorced and remarried. Among the husband's friends her divorce counts as nothing; his remarriage, if he makes one, is the only one which can deserve respect. In Utah the wife's divorce is all-sufficient for both parties, and that obtained by the husband is a ridiculous superfluity. In New York the Utah divorce is a sorrowful nullity; the New York one, only, is operative. And suppose these persons remove elsewhere, how will they stand under the laws where they are going to dwell?

Take the Hood case,\* which occurred in Indiana. Hood married one wife in 1869, and, while she was yet living, left her, and in 1876 married another. Prosecuted for bigamy, he exhibited, in his defence, a Utah divorce which he had procured from his first wife before the second marriage. But Hood had never been a resident of Utah, and Goodrich, his lawyer, had not given any actual notice of the suit to the first wife. The court said that to obtain a decree of divorce elsewhere which would be valid in Indiana, one of the parties, at least, must be a resident

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\* Hood v. State, 56 Ind. 263.

within the jurisdiction. Here neither of the parties was under the jurisdiction of Utah; the petition of Hood and the decree of divorce expressly stated that they were not; hence the court of Utah had assumed to grant a divorce to a man who informed it, in his application, that he was under a jurisdiction other than that of the Territory of Utah, and that he was not subject to that. This was manifestly in violation of the plainest principles of international law. And Hood was convicted and sentenced to fine and imprisonment.

The New York *World* recently narrated that one of its reporters called upon a divorce lawyer habitually advertising in the newspapers, and invoked his services in a fictitious case, invented for the purpose of testing how far the system was carried. The reporter was, in fact, a bachelor, but pretended to be married to a wife of incompatible temper, from whom he wished to be divorced. A summons and complaint in blank as to the defendant—the complaint apparently, but not really, verified—were drawn up, and the injured husband sent them to a friend in Canada who was in the secret, with a letter from the attorney stating that the wife's admission of service would assist the husband in a suit against a party whose name was not definitely ascertained. In due time the admission was returned, apparently signed by the wife, from whom the pseudo-husband also apparently obtained some letters acknowledging her faults, etc., to facilitate the matter. In a few weeks, without anything more having been done, to the knowledge of the reporter, he was furnished by the attorney with a copy of a decree of divorce of the Circuit Court of Walworth County, Wisconsin, purporting to have been rendered after a hearing of proofs, etc., and purporting to be signed by John T. Wentworth, Circuit Judge, and certified and sealed by the clerk, with all due form and red-tape. The *exposé* did not interrupt the appearance of the attorney's advertisements.

## WHAT BECOMES OF THE DIVORCE LAWYERS.

The experiences of the Chicago lawyer Goodrich, the one by whom the Hood divorce was procured, show, from another point of view, the same prevalent opinion in the courts of the States upon the invalidity and worthlessness of these Utah divorces. The complaint against him was that he published anonymous advertisements in papers throughout the country, like these: "Divorces legally obtained for desertion, cruelty, etc. Fee after decree. Eight years' experience. Scandal avoided." "Divorces legally obtained for incompatibility. Residence unnecessary." "Divorces legally obtained without publicity and at a small expense. Address Box 1037 P. O., Chicago." Also, he distributed circulars, dated from his office, offering to procure divorces on the ground of mere incompatibility, and for a contingent fee of \$125. Members of the Chicago bar took the matter up as a breach of Goodrich's duty as a lawyer, and professional misconduct for which he should be expelled from practice. Goodrich explained that he procured his divorces in Utah. In defence against the motion to disbar him, he urged that the circulars and advertisements did not say where he would procure the divorces, and that, in truth, he procured them in Utah, where they were lawful and valid. But the court adjudged that his publications would fairly be understood as implying that his practice was in Illinois; that they were a scandal upon the administration of justice in that State, and a gross breach of his duty and obligations to his profession; and that Mr. Goodrich must step down and out.\*

Other instances of similar misconduct have been judicially established. One of Chancellor Walworth's earlier decisions† was to strike from the roll a solicitor named Peterson. Peterson was employed by a husband to procure his marriage annulled, and

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\* *People v. Goodrich*, 79 Ill. 148. † *Matter of Peterson*, 3 Paige, 510.



forged the name of the deputy-register to a decree to that effect. He furnished this false decree to the husband, who paid the fees, but afterwards complained of him to the chancellor. In defence, Peterson adduced evidence that the husband very well knew how the decree was to be made; the proceeding was fictitious, and only designed to lead the wife to believe she was divorced. The chancellor said that might be a reason why the husband could not complain of having been cheated out of the fees, but was none why the "shyster" should not be disbarred, which was ordered.—There has been a later case in which the device adopted by the lawyer to escape penalties of forgery was this: He would search the records of the court for a genuine decree of divorce which was so drafted as to answer his purpose, and procure an exemplified copy from the clerk. He would then detach and throw away all the sheets of the copy but the last one, containing the signature and certificates attesting it genuine. To this last page he would prefix a body of a decree drafted to fit the case in which he was employed; bringing the writing down to meet and run onward with the words, whatever they happened to be, with which the genuine last page commenced. He was thus enabled to deliver to his client what appeared to be a genuine document, and, indeed, bore every signature, seal, and certificate,—and true ones,—necessary to its validity. Possibly the ingenuity of this plan would have saved him from a prosecution for forgery; it did not protect him from summary expulsion from the bar.

## CHAPTER XX.

## INSANE PERSONS.

THE civil incapacities of insane persons have been well understood for centuries. But great change and progress are noticeable, during the past century, in the judicial tests for determining insanity, in the formalities and protections imposed upon the custody of lunatics, and in admitting insanity as a defence for crime.

## WHO ARE THE INSANE?

This, obviously, is chiefly a medical and psychological question. The law has followed, slowly, the progress of the medical profession, recognizing new forms and degrees of insanity, and extending protection to types of defective or diseased mind formerly undistinguished from the sound. A century or so ago, the courts and lawyers seem to have known nothing about insanity. They had some rude tests, such as that, if a man could not count twenty, did not know his father or mother, could not be taught to read, he was not a responsible creature; and a vague idea that a person might be driven stark-mad by the moon shining upon him at night, in which case they called him a lunatic, and refused to punish him. But there has been a steady progress made by physicians studying the phenomena of mental disease, and bringing new forms and distinctions to the notice of the courts; while the courts have doubted, discussed, and resisted, but are gradually adopting the advanced views.

## KINDS OF INSANITY.

A century ago, courts had little idea of different kinds of insanity other than a rude division into "idiots"—they being, gen-

erally, persons who never possessed reason—and “lunatics,” or those who were deprived of it after it had once been possessed. It is now well understood that medical men have ascertained many distinctions in the kinds of mental disease; and that several careful and minute classifications have been proposed among physiologists. The classification which is most commonly cited among courts and lawyers, though possibly more recent ones may have higher merit, originated with Esquirol. As restated by Dr. Hammond,\* it admits the following distinct forms:

*Melancholia*.—Perversion of the understanding in regard to an object, or a small number of objects, with the predominance of sadness and depression of mind.

*Monomania*.—Perversion of understanding limited to a single object, or a small class of objects, with predominance of mental excitement.

*Mania*.—A condition in which the perversion of understanding embraces all kinds of objects, and is attended with mental excitement.

*Dementia*.—A condition in which those affected are incapable of reasoning, from the fact that the organs of thought have lost their energy, and the force necessary for performing their functions.

*Imbecility or Idiocy*.—A condition in which the organs have never been sufficiently well conformed to permit those affected to reason correctly.

In modern law practice, an inquiry into insanity generally resolves itself into a comparison of the person's condition with these or similar delineations.

#### DEGREES OF INSANITY.

One may read early law-books for a long time without meet-

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\* Diseases of the Nervous System, pp. 335, 336. Three other classifications presented in Dr. Hammond's work, one of them his own, are well worthy the attention of jurists.



ing indications that the judges took much notice of degrees in mental alienation. And for a long time after they realized that it might be more or less marked, they had only one vague phrase, "unsoundness of mind," to express the lighter shades. At the present day, it is better understood that there are all grades of mental impairment; and, while no distinct names or definitions are in practical use for legal inquiries, it is recognized that the same person may be sane enough for some legal purposes while insane for others. Suppose, for example, the question is, whether the person was capable of any specific act or transaction of ordinary business in which he has taken part; such as making a contract, giving a deed, or defending a lawsuit. The degree of ability required is that he was able to know the nature and results of the particular act, so that he may be said to have acted rationally in doing it. He may not have acted wisely; but foolish doings are not insanity. On the other hand, he need not have been wholly deprived of reason; if he had not reason sufficient to comprehend the thing in question, he will be protected against the consequences of what he did, notwithstanding other parts of his life show sound mind for other purposes. Suppose the question is whether a will is valid. This does not require so much mental power as does the transaction of ordinary business in life. If the testator was able to recollect his property, and the persons among whom it should naturally be bestowed, with sufficient clearness to direct intelligent dispositions, his will may be sustained, although he may not have been in mental capacity equal to the management of affairs of life. Suppose the question is upon an application to take a person's property out of his hands, and appoint guardians to take care of it and of him. Here the modern practice has been to let witnesses narrate to the jury all the eccentric behavior, delusions, incoherent language, and foolish conduct of the person in question; also, often to produce him to be examined, and then to throw the responsibility upon the

jury. If they say that they think "he is of unsound mind and incapable of managing his affairs," the court will appoint guardians for him. If they do not think him weak-minded enough to warrant this verdict, he goes free. But the progress of the law is making the test easier, and giving the protection of guardians to persons whose insanity is not so marked as was formerly deemed to be necessary.

#### GOING TO THE ASYLUM.

Suppose the question is whether the person ought to be placed in an asylum; what degree of insanity is needed for that? The grounds for this are violence endangering the person's neighbors, or his need of medical care and remedies. These call for measures of mental disturbance very different from those appropriate when contracts, property, or wills are in question. There has been great popular complaint at the ease with which persons might, on mere suggestion of insanity, be immured for life. English novels abound in dramatic pictures of an abuse of this kind. Some years ago, a reporter of a New York paper, to test the scientific precaution which was exercised in receiving patients, caused himself to be carried by friends to an asylum, he feigning insanity; and he did this so successfully that the superintendent received him as a patient. Such a case proves little against the general administration of the law. There is no need of precautions against taking persons to the asylum who desire to go, and feign insanity for the purpose: the important practical question is whether a person who objects and resists, who declares himself sane, and so conducts himself, can, notwithstanding, be confined. There was a harrowing account in the public journals, a year or two ago, of a lady passenger in a railroad car whose costly jewelry attracted the cupidity of two scoundrels who saw her. They pretended to be escorting her to the asylum as insane; and, according to the narrative, the conductor was actually deceived, and co-operated with them in forcing

her, notwithstanding her remonstrance and entreaty, into a carriage, and they drove away with her, to rob her of her valuables at their leisure. But this, if true, shows, not that the administration of the law or the management of asylums is defective, but only that some railroad conductors are ignorant. There has been in past years, doubtless, some real ground to complain of the law that it did not afford sufficient protection against immuring sane persons on false charges of insanity. Recently this subject has had careful attention. In New York particularly, and in some other jurisdictions, the safeguards have been much improved.

The laws of New York as to carrying persons to the insane asylum were all revised and improved as recently as 1874, after a careful examination and report on the whole subject by the Attorney-general and the State Commissioner on Lunacy.\* It is an old rule, and a necessary one, that a person who falls suddenly under an attack of violent lunacy may be taken care of temporarily, without any legal authority or papers, so far as needed to prevent his doing mischief. A crazy man attempting to kill himself may be stopped; or one rushing through the streets with a drawn knife or pistol may be caught, and the weapon taken away. The imminent mischief may be prevented. If a passenger by cars should break out into crazy violence, putting himself or fellow-passengers in danger of injury, they or the conductor would be justified in confining him enough to prevent the injury. Beyond this, nothing can be done without a certificate. Husbands or brothers cannot carry their wives or sisters, who object, to an asylum without a certificate. Without a certificate, even that ingenious New York reporter cannot go to an asylum and enter himself as a patient of his own accord, so that he cannot leave, the next day or next hour, if he wishes to do so.

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\* N. Y. Laws, 1874, 564, ch. 446; Ordonaux, *Judicial Aspects of Insanity*.



The certificate must be signed by two physicians: one is not enough. And it must be sworn to be true. It must be founded on a personal examination of the patient, and must state particularly the facts which have convinced the signers that the person is insane. Moreover, it must show that the physicians who sign it have this special authority; for all practitioners are not allowed to give these papers, lest certificates by irresponsible quacks should be used. Only physicians who have been approved by the judicial authorities as "Medical Examiners in Lunacy" can give them. Without such a certificate, no person can make any pretence to escort another, who objects to going, into an insane asylum, no matter whether there is insanity or not. A quiet, peaceable, insane person has right of liberty until this certificate, on an examination by two authorized physicians, has been made.

This document can be used for ten days from its date only; and it authorizes keeping the insane person shut up for five days, and no longer. If the friends of a lunatic obtain a regular certificate and carry him to an established asylum, and he is evidently insane (not violent), the superintendent cannot keep him on the certificate alone. The friends must submit the case in some court of record where the person resides, and obtain approval of the court; and the courts have full power to examine witnesses and make every inquiry. Justices of the peace used to have this authority, but it is now confined to the higher courts. The State Commissioner on Lunacy has also large powers in investigation and control of asylums.

Under this system, insanity does not justify any interference with a person's liberty. Violent conduct will justify restraining the person temporarily, but not carrying him to an asylum; for that a formal certificate must be obtained. A certificate warrants carrying the person to an asylum, but not keeping him there for treatment; for that purpose a judge's examination and approval are needed.

## THE PLEA OF INSANITY.

Suppose the question is whether a person upon trial for a crime—a murder, for instance—was insane when the act was committed, and, therefore, not deserving of punishment. This form of the inquiry has produced more discussion in modern courts than all the others. And there has been a marked advance. By the year 1800, medical jurisprudence had advanced so far as to prescribe one rule for determining insanity in cases of crime which is still respected—viz., if the individual is incapable, from mental imbecility or disease, of knowing the criminality of an act which he commits, he is not amenable to punishment for it. The adjudications propounding this rule at so early a date are, of course, chiefly English, but the American States adopted the doctrine. It prevails throughout the Union.

Probably the courts of law might have remained contented for centuries with a single standard like this, if it were not for the humane tendencies and zeal of the medical profession, who have been steadily calling attention to types of insanity previously undistinguished, and urging the rightfulness of medical treatment rather than criminal punishment in new classes of cases. Hence, towards 1850, an important qualification of the legal test of insanity became established throughout England and America. Medical men testified that many instances were observed in which an individual, though capable of judging sanely of right and wrong if the facts were truly before his mind, yet had his judgment fatally perverted, and his consequent action uncontrollably vitiated, by delusions which were the product of disease. For example, a man might well understand that it was wrong to kill, in general, and right to kill in self-defence; yet if he were possessed by a diseased hallucination that a person was going about to kill him, he would shoot that person at sight, under the very influence of his sound judgment as *to his rights*. After many discussions, the courts conceded that

this class of persons are proper subjects for the asylum rather than for the jail or gallows. M'Naghten's case\* in England, and Rogers's † case in Massachusetts, aided by auxiliary decisions of less note, but powerful aggregate influence, established the rule that a person overwhelmed by diseased delusions as to facts, such that, if his imaginings had been true, his acting according to them would have been innocent, should be exempt from amenability to criminal punishment.

This brings us to the question of the present day; for recently a third phase of insanity has been alleged. The instance of the boy Pomeroy will occur to every reader. It was not supposed that he did not know, intellectually, that murdering his playmates was contrary to law, nor was it claimed in his behalf that he was misled by any hallucinations which, had they been true, would excuse his deeds; but the hesitation in ordering him to execution was founded on his supposed incapacity to control his conduct by his sense of duty. Cases of what is called kleptomania illustrate this aspect of the question. The subject may know that articles belong to another, and understand that stealing is punished, but cannot help taking what he sees exposed. Medical men, constantly studying diseased mental action in all its forms, declare that organizations exist in which they see no loss of the power to judge of right and wrong, nor any disturbance from hallucination as to facts, but find the mind powerless to control conduct in view of its knowledge. The subject of such disease knows what is right, but cannot choose it; what is wrong, but cannot shun it.

Are there such organizations? If there are, is their incapacity a rightful ground of exemption from penalties of law? If it

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\* M'Naghten's Case, 10 *Cl. and F.* 200.

† Commonwealth *v.* Rogers, 7 *Metc. (Mass.)* 500. An able review of the cases on the subject of delusions is given in 1 *Benn. and H. Lead. Cr. Cas.* 100.



seems to be intrinsically a right ground of excuse, can the excuse be allowed with safety to the community, while our modes of ascertaining human motives and purposes are so uncertain? These are the questions which constitute the problem of "moral insanity."

Moral insanity means that a person may have mind enough to know what he is about, but not have moral sense—will to do right—sufficient to resist temptation or refrain from crime. If a man cannot help striking another, or a woman cannot help stealing the goods she sees, the State ought not, so say the prisoners' counsel, to inflict punishment, but should send the unhappy victim of an uncontrollable impulse to the asylum. This argument was often heard in the New York criminal courts from 1850 to 1870. Freeman's case,\* which ran through 1846 and 1847, was probably the earliest in this State in which the doctrine was urged with much effect. Freeman was prosecuted for murder under circumstances causing much popular feeling against him, but was stoutly defended by William H. Seward, on the ground, then novel, of moral insanity. During the protracted proceedings, the prisoner fell into the lowest stage of imbecility, and died, so that the case reached no final decision on the soundness of the defence, in law, though it gave Mr. Seward celebrity, and the doctors who investigated the interior of Mr. Freeman's cranium reported that they found abundant reason substantiating the imputation of insanity.—Kleim's case† presented similar points; he was tried also for murder. Judge Edmonds sustained the defence as sound in law, and the jury found it proved in fact, and the prisoner was acquitted.—On the trial of Huntington, for forgery, in 1856, the question was discussed between Brady, for the defence, and Noyes for the prosecution; but the judge repudiated it in his charge, and the pris-

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\* Trial of Freeman, *Pamph.*; also *Freeman v. People*, 4 *Den.* 9.

† *People v. Kleim*, *Edm. Sel. Cas.* 13.

oner was convicted.\*—In Macfarland's case, tried in 1870, for the murder of Richardson, the Recorder allowed the defence to be a sound one, and charged the jury, in effect, that to become amenable to punishment a person must have not only intelligence enough to know that the act he is about to commit is punishable, but also will-power to enable him to choose between any gratification he may expect from committing it and the immunity from punishment he will secure by refraining.† And the jury acquitted the prisoner, as was generally understood, because they thought he lacked this will-power.

But in 1873 the Court of Appeals extinguished, for New York State, this species of defence, by the deliberate decision, in Flanagan's case, that a moral inability to resist temptation does not excuse from punishment. Flanagan was tried for killing his wife, and the defence of moral insanity was put forward. It was disallowed upon the trial, and the prisoner sought a review. The Court of Appeals declared the settled law of the State to be that the only question, under the defence of insanity, is the capacity of the accused to distinguish between right and wrong as to his act. There is no rule that a power of choosing right in preference to wrong, as a distinct element, is necessary to responsibility, or that a man who can know the criminal character of his action is exempt from punishment because he lacks self-control.‡ In four other States the courts of last resort have rendered decisions against moral insanity. And such is the decision of the United States Circuit Court for the First Circuit,§ the only Federal tribunal, we think, in which this question has been presented since its proportions were fully known; though on the trial of Sickles, in Washington, the judge granted instructions

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\* Trial of Huntington.

† Macfarland's Trial, 8 *Abb. Pr. N. S.* 57, 89.

‡ Flanagan v. People, 52 *N. Y.* 467.

§ United States v. Holmes, 1 *Cliff.* 98, 118.

which in effect allowed the defence, while on the trial of Mary Harris it was nearly disallowed.

Reviewing, in a general way, the course of decision in other courts, omitting details, which are of importance, yet cannot be noticed here, it appears that in eight of the States—Connecticut, Illinois, Indiana, Iowa, Kentucky, Michigan, Ohio, and Pennsylvania—the courts of last resort, deferring to the general testimony of physicians that moral insanity is a disease of known existence, have recognized it as a sound defence in law.

The case of Bradley, in Indiana, illustrates the general position of these States adopting the progressive view. Bradley and Evans were neighbors and good friends. There was no quarrel between them. Bradley one day was angered by the annoyance of stray hogs in his door-yard. Trying to drive them out excited him to a violent fit of passion. Meantime Evans started from his own door-step, near by, and walked towards Bradley's house. He was not owner of the hogs, and had done nothing to give Bradley offence; but Bradley, excited by his trouble with the swine beyond all reason or self-control, suddenly declared he would shoot Evans, rushed into his house for his pistol, returned, and shot and killed Evans as he was approaching. There was a trial for murder. No provocation for the shooting was suggested, nor any delusion or hallucination. There was evidence of long-continued drinking habits which had impaired a mind naturally feeble, beyond even their usual ill effects; of conduct manifesting insanity in Bradley himself; and of several cases of undoubted insanity among his immediate relatives. The Supreme Court adjudged that insanity is a disease which may impair or totally destroy the understanding or the will, or both. If it has destroyed either, the person is not a subject of punishment.\*—Johnson's case, in Connecticut, also well represents this view. It was a murder trial, decided in April, 1873, the same

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\* Bradley v. State, 31 *Ind.* 492.



month with Flanagan's case at Albany. One defence was that the prisoner, by long habits of drinking, also by a severe injury, had become morally incapable of self-control. The courts below and above ruled that to warrant punishing him, he must have had intellect enough to know that what he did was punishable, and, also, he must not have been overcome by an irresistible impulse arising from disease.\*—And there have been two representative cases in Iowa,† in their circumstances one upon each side of the line which divides an act caused by an uncontrollable, insane, or diseased impulse from one prompted by extreme but natural passion. The Supreme Court has decided that since medical science shows there is a diseased condition of the mind in which, although the subject abstractly knows that a contemplated act is wrong and punishable, he is yet irresistibly driven by an insane impulse to commit it, this should be recognized as a defence. A want of power to govern one's conduct which springs from a diseased or insane condition of the mind is a ground of exemption from punishment; but not so a want of power which springs from unrestrained indulgence of natural passions.

Let it be observed that the courts which allow moral insanity do not assert that it exists. They say only that they find it asserted in the works of experienced students in this field; that what constitutes mental disease is a question of fact upon which the law ought to accept the testimony of physicians; and that whenever these discover new causes or forms of irresponsibility, the courts should mould their rules to correspond. The courts which repudiate the defence do not dispute that moral insanity may have foundation in medical observation and deserve to be regarded by physicians in the treatment of patients. They say only that it cannot safely be adopted into the criminal law, on account of the vagueness and uncertainty of the inquiry which the theory demands.

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\* *State v. Johnson*, 40 *Conn.* 136.

† *State v. Felter*, 25 *Iowa*, 67; *State v. Stickley*, 41 *Id.* 232.

## CHAPTER XXI.

## CODIFICATION.

ALLUSION has been made, in a previous chapter, to the readiness of American legislatures to authorize revisions of the law, or even codes. The subject of codification, and the recent progress that has been made in it, deserve to be presented.

## NATURE OF A CODE.

At the outset one must bear in mind that a code and a revision, in the strict sense, are quite different. A "code," correctly speaking, is an enactment setting forth, in generalized and systematic form, the principles of the entire law, whether written or unwritten, positive or customary, derived from enactment or from precedent. Scarcely half the law now prevailing is traceable directly to acts of legislation; a very large proportion is attributed to the customs of the people, ascertained and declared in decisions of the courts as its origin. A true code seeks to re-enact in concise, lucid form the general principles derivable from both sources—from the pre-existing statutes and the common-law adjudications. A "revision of the laws" is a less extensive undertaking. It aims only at exhibiting, in brief compass, and with proper corrections and improvements, the statutes which, for a term of years, have been accumulating until they have become too numerous and confused. A code, if perfect and unambiguous, would be (at its first enactment) a substitute both for statutes and reports previously in use. A revision, however complete, supersedes only previous acts of the legislature. But this distinction is not very closely regarded in the *nomenclature* of American books. At the present time ten or

twelve of the States call their compilations of the general laws Codes, yet many of them are not materially different from revisions; about fifteen call theirs by the more correct name Revised Statutes; and others use equivalent designations, such as Compiled Laws, General Statutes, Revised Laws. Nearly every State has either authorized or adopted as official a compilation of its laws made by lawyers of ability and reputation, or has employed commissioners to draft its laws into a system, and has re-enacted them as thus compiled. In many of the States this has been done several times. Very few are without some systematic compend of the statutes prepared within the past twelve or fifteen years; and at all times a number of these revisions are proceeding. Some of the "revisions" have included important and extended reforms in the law; others have not. The New York Revised Statutes, adopted in 1828 and 1830, and the Massachusetts General Statutes of 1860, are notable examples of revisions embodying improvements. The United States Revised Statutes (1873) present an instance of a simple consolidation; the acts of Congress, as annually published, had become not only inconveniently bulky, but also inconsistent and obscure. The revision aimed only at presenting the general and permanent laws, previously running through seventeen tomes, in a single volume, accurately condensed, but unchanged in substance.

#### THE NEW YORK CODES.

An extended and important scheme of codification in the broader sense has steadily, for a generation, been in progress in the State of New York, with the higher purpose of giving systematic, formulated expression to the whole law. It has exercised wide-spread influence, and produced important results. The Constitution of 1846 gave directions for codifications of the general law of the State and of the procedure of the courts. Two boards of commissioners were constituted under the two branches of this constitutional mandate. One of these is known as the



Commissioners of Practice and Pleading (Messrs. Arphaxad Loomis, David Graham, and David Dudley Field); it was charged with the duty of revising the rules and practice, the pleadings, forms, and proceedings, of courts of record. To the other, known as the Commissioners of the Code (Messrs. David Dudley Field, William Curtis Noyes, and Alexander W. Bradford), was assigned the task of framing three codes of political, civil, and penal law.\* No doubt all these commissioners rendered sincere co-operation in the great undertaking; and the contribution of service by Mr. Noyes is known to have been extended and valuable, until it was terminated by his death in 1864. But the only member who, having been active in initiating the constitutional movement, and having been connected with the work, in both commissions, from the beginning, has lived to see it draw towards a close—the one whose steadiness of purpose has preserved it alive under every discouragement, and whose continuous, comprehensive, and untiring labors have given unity, system, and thoroughness to the whole—is Mr. David Dudley Field.

Very soon after their appointment, the Commissioners of Practice and Pleading reported a Code of Civil Procedure; and, at

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\* The leading works of these two commissions—the volumes embodying the ultimate results of their labors—are:

*Code of Civil Procedure.* Reported complete. Albany, 1850.

*Code of Criminal Procedure.* Reported complete. Albany, 1850.

*Political Code.* Reported complete. Albany, 1859. This embodies the political law of the State; citizenship; boundaries and divisions of the State; public officers; general rights of the State; public ways; general police of the State, etc.; laws for the government of counties, towns, and villages.

*Civil Code.* Reported complete. Albany, 1865. It contains a full system of provisions regulating persons, property, and obligations, including contracts, trusts, agency, partnership, insurance, etc.

*Penal Code.* Reported complete. Albany, 1864. This presents a system of criminal law; including the principles which determine amenability to punishment, the definitions of crimes, and measure of punishment for each, and the subject of prison discipline.

later dates, a Code of Criminal Procedure, and the Political, Civil, and Penal codes, were submitted. The statute which has become famous as the "New York Code" was made from the report of the Code of Civil Procedure; it has established a very novel mode of conducting actions in the courts. Lawsuits where the code prevails are much simpler than under former systems. The other four codes have not, in New York, yet been made law. The Political has, perhaps, not been very earnestly pressed upon the attention of the legislature. The other three (amended to conform to recent changes in the law) passed both Houses of the legislature in 1879, but failed to win the governor's assent. They were under consideration again in the legislature of 1880.

#### WIDE-SPREAD ADOPTION OF THESE CODES.

Sufficient testimony to the value of the codes and their adapt-  
edness, in general, to modern wants in jurisprudence is found in  
the manner in which they have been welcomed in other juris-  
dictions. The Code of Procedure, in particular, has been ex-  
tensively adopted in other States. It is not easy to name them  
with exactness, for while some have adopted nearly the whole  
act, others have only followed it as a guide in framing one like  
it; and others still have taken only leading features from it;  
moreover, there have been numerous amendments to it, and these  
have not always been re-enacted even by States which took the  
original into favor. No two States conduct law business in the  
courts precisely alike. But, speaking generally, the following  
are said\* to have adopted the general spirit and important fea-  
tures of the New York method as a whole: Missouri, Ohio, Ken-  
tucky, Indiana, Wisconsin, Iowa, Minnesota, Kansas, Nebraska,  
Nevada, California, Oregon, Mississippi, North Carolina, South

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\* See an account in the *Albany Law Journal*, March 8, 1879; Colorado and Connecticut being later accessions.

Carolina, Arkansas, Colorado, and Connecticut; and nearly all the Territories may be added. States which have hesitated to employ the reformed procedure in its entirety have embodied prominent features of it in special laws. Some United States judges, before the general adoption, in 1872, of State practice laws for national tribunals, took the New York system as a rule of court for governing practice before them. And its principles are well understood to have been very influential in framing the new procedure recently established in England, and in moulding the practice pursued in most of the British colonies.\*

Although the other codes have not yet been enacted in New York, they have been made the substantial basis of legislation elsewhere. The report of a code of criminal procedure is said to have been adopted by Indiana, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Nevada, California, Oregon, Kentucky, Arkansas, and by seven of the Territories; and California and Dakota Territory have also adopted (in substance) the other three of the five codes; have, in short, accepted the system as an entirety.

#### GENERAL NATURE OF THE REFORMED PROCEDURE.

Let us now return to the Code of Procedure—the one which, though less important in its subject-matter than the Civil or Penal Codes, has attained, by reason of its early enactment, a wider influence on the practical administration of jurisprudence. Nothing like an analysis or epitome of its provisions would be admissible here; but an indication of the nature of the changes it introduced may be of interest. Prominent features are the fusion of law and equity in the same courts and proceedings; allowing an assignee, or any real party in interest, to sue in his own name, instead of compelling him to bear the name and wear the guise, all through the suit, of the original owner of the

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\* See an article by A. P. Sprague on American Codification and the English Judicature Acts, *Law Mag. and Rev.* Nov. 1879.



demand; abrogating forms of action, and enabling all causes to be prosecuted under one form, that of a civil action; abolishing special pleading, and the fictions so numerous in the old practice; authorizing a disregard of technical and formal errors, such as do not mislead, and giving liberal permission to make amendments; discarding the rule which forbade the testimony of a party or interested person to be heard, and inviting all who have personal knowledge of material facts to tell what they know; and assimilating civil procedure very much to that of equity courts in many matters of detail, though retaining trial by jury, and several auxiliary remedies more peculiar to common-law procedure. Changes of this general nature, broadly conceived and courageously carried out, have rendered the system untechnical, flexible, and progressive; easily understood and administered by honest-minded men of moderate learning; free from traps and pitfalls for the inexperienced or unwary; and generally well adapted to the wants of sensible, progressive communities.

#### THE MARRIAGE OF LAW AND EQUITY.

Some readers may desire the explanation that for four or five centuries jurisprudence was conducted on a plan of maintaining one set of courts to control the action and supply the deficiencies of another set. The reasons for this are purely historic; if a scheme of tribunals were to be organized anew, a division between law and equity would not be adopted. Its origin is veiled in early and obscure history, but the appearance in modern times has been as if the Anglo-Saxon mode of administering justice had been cast in a mould like this. Imagine that in feudal times one baron who was wronged by another, or a yeoman who was oppressed by a baron, travelled to the King's "court" and laid complaint before the sovereign; that royalty delegated to judges the task of hearing and deciding these complaints; that these judges, holding the law courts, were so scrupulous in following precedents, and so embarrassed, often, by injudicious

acts of Parliament, as to frequently do injustice in a particular case in their zeal to follow general rules of law; and that the sufferers under such unjust decisions became accustomed to resort anew to the king, praying that he would prohibit or restrain his judges from enforcing the strict law, and would compel what was naturally just and right to be done instead. Imagine, then, that the king was wont to consult his chancellor,—an ecclesiastical officer of character, learning, and experience best fitting him to advise on questions of pure right,—and to decree that to be done, though contrary to legal rule, which the chancellor advised was just. From some such beginnings as these arose the double system of courts—law courts, conducted by judges and administering fixed, precise rules; and courts of equity, under the Lord Chancellor and subordinates, authorized to interpose according to rules anciently very flexible and liberal, afterwards made more fixed, for the purpose of preventing injustice from being done in the name of law. Until 1875 this double system was strenuously maintained in England. Until the Constitution of 1846 and the Code of Procedure, it was maintained in New York. In many of the States it has prevailed through a part or the whole of the judicial history. The reformed procedure establishes one system of courts only, and commands those courts to decide each cause aright, and as law and equity, taken together, would do.

The beneficent working of this change may best be understood from some actual case showing the hardship of the former division of the courts. When Thomas Andrews, who was a Catholic, and Ellen Fleetcroft, who was a Protestant, were about to be married, they entered into a marriage settlement stipulating that any sons should be educated in the father's religion, any daughters in the mother's. A daughter was born, and, within a few months after her birth, the father died. Two days before he died he made a will appointing his brother Joseph to be his daughter's guardian. For years Joseph made no claim to the care of his niece. Meantime the mother married again;

the little girl was then adopted by her maternal grandmother, who became strongly attached to her, and by whom she was educated as a Protestant, which was according to the marriage settlement. But at length Joseph commenced a *habeas corpus* suit to have the little girl, now nine years old, given up to his care. This was in the days of the distinct courts, and the suit was brought in the old court of Queen's Bench. As it was a suit according to strict law, the Queen's Bench judges decided that they had no power to refuse it. They could not proceed according to the wishes or welfare of the child, but must defer to the father's appointment of a guardian. They spoke strongly of their decision being a harsh one towards the grandmother, but said that they had no discretion, they were bound to hand the child over to the custody of the guardian appointed by the will.\* The injustice and cruelty of the decision were undeniable, but the court felt compelled, by statute and case law, to make it.

But the mother's relatives invoked the aid of chancery. Their counsel invented the device of their contributing a purse of £20, which they gave to trustees for the benefit of the child. They then filed a bill before the chancellor to make her a ward in chancery, and to direct the administration of the trust money. When she had been made a ward in chancery, that court granted an injunction forbidding the uncle from interfering with her. This was on the ground that chancery, in deciding upon arrangements for a ward, may do what a court of law cannot do—consider, primarily, its happiness and welfare, and award it, notwithstanding its father's will, to the care of those by whom it has thus far been reared.†

This case shows law corrected by chancery. Another, taken not from law-books, but from reminiscences of English tales, illustrates how chancery might be outwitted by law. The

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\* Matter of Andrews, *L. R.* 8 *Q. B.* 153.

† Andrews v. Salt, *L. R.* 8 *Ch. App.* 622.



heroine, almost of age, was kept practically in durance by guardians, acting under authority of chancery, who were planning to coerce her into a marriage with their son, in order to keep her large fortune in the family. A lover whom she preferred, but was not permitted to meet, consulted a sharp-witted attorney in her behalf. He asked, "Has the young lady any friend whom she can trust?"—"Yes; her old nurse."—"Let the nurse lend her £25 and employ me to collect it." This was done. The attorney then procured a writ of *habeas corpus*, requiring the guardians to bring their ward to the court-room to answer why they kept her restrained. They brought her, and showed their authority from chancery. A lawyer went through the form of arguing the case on her side, but the flinty-hearted judge denied the petition upon the spot, and rebuked the counsellor for employing a *habeas corpus* in so flimsy a case. No matter. As the guardians escorted the young lady out from the court-house door into the open street, Law had an opportunity to interpose. The attorney and two sheriff's officers stationed near stepped forward and arrested her for the £25 debt. Placing her in a carriage, they drove rapidly to the debtors' prison, leaving the guardians to follow whenever they could find the way. The instant they reached the jail, the accepted lover paid the debt; the fair prisoner was discharged; there was a prompt journey to France, and an early marriage; and, in due time, a recovery of the lady's fortune followed. The tale is imaginary, perhaps not possible of occurrence in its exact details; but there is no doubt that such sort of collisions between law and equity often occurred.

And there is, upon the whole, good reason for deeming it an abuse that there should be two courts authorized to decide the same case in different ways, or to interfere with each other's orders and process. This abuse is, by the reformed procedure, effectively remedied.

## DEATH AND BURIAL OF JOHN DOE.

What are called "legal fictions" have more use and reason than readily appear. They are used as devices for doing justice indirectly which the courts have not felt at liberty to do directly. Many of them are explained by studying their history; and others have been maintained in the courts because of their usefulness in tempering severe rules of strict law, long after the reasons of their origin cease to be apparent.

John Doe rendered great service in old-fashioned law practice, in taking the place of an individual who needed to be named in order to satisfy the requirements of a complete theory or broad philosophy, but for whom there was no actual use. When the general purpose of legal proceedings was to present theoretic relations rather than actual facts, it constantly occurred that some one needed to be represented to suit the theory who did not exist in point of fact. John Doe stood always ready to promote the administration of justice in these cases, and would take part almost anywhere for the purpose of filling a vacancy in the *dramatis personæ* of a lawsuit. He would take the place of any actor who was cast for a part, but, through lapse of time and changes in law practice, had become no longer necessary to the success of the play. If one fictitious personage was not enough, as in some proceedings was the case, his relative (nearly as distinguished), Richard Roe, would cheerfully co-operate; and there was a considerable family of Jacksons, Goodrights, Dens, and others, of like history and functions.

The English law of a century or so ago allowed arrest for debt, generally. In any case of borrowed money, a promissory note unpaid, goods bought, and the like, the debtor might be cast into jail until payment.

In process of time, this system became obnoxious as oppressive and inhuman. The modern American view of the best way of conforming the law to such a change of opinion would be to

obtain an enactment of the legislature, stating anew the cases in which debtors might be arrested. It was not so easy in former times as it is now to obtain acts of Parliament embodying improvements in the law. The judges could not abolish arrest for debt directly, nor could they refuse process of arrest to a creditor who asked it; but they could take bail, and to the extent in which they had this authority they could exercise it so as to relieve imprisonment for debt, by accepting fictitious sureties. Thus, long before an explicit reform was obtained, a large class of cases was recognized in the courts in which imprisonment was seen to be undeserved, and the unfortunate debtor was allowed to escape it by giving fictitious sureties. John Doe and Richard Roe were active in giving bail for unfortunates arrested under the letter of the law, but whose cases recommended them to the merciful consideration of judges. The creditor could have an arrest, to be sure; but if the case was one of the favored class, the defendant would offer John Doe and Richard Roe as sponsors for his appearance, and the court, having entire confidence in their responsibility! would accept the bond and allow the debtor to go at large until trial.

The forms of the old action of ejectment, the formal lawsuit usually brought to establish a right to lands, illustrate this use of fictitious persons in another aspect. Bearing in mind that it was the spirit of the old practice to treat cases according to theoretic relations and legal aspects rather than according to actual facts, it will be readily seen that the typical, theoretic case of a suit to regain land involves four persons. 1st. There is the real owner of the land; he who may be supposed to have been formerly vested with it. 2d. There is his tenant, the person to whom he leased it, and who had actual occupancy and enjoyment. 3d. There is the person who put forth a claim to the land, drove out the tenant, and established himself in possession. And 4th. There is the "rough," the man of force and weapons, whom he employed to assist him. To suit the views of the



old practice, all these four persons must be represented in the lawsuit. It was commenced on behalf of the supposed tenant, the man who had lost the immediate use of the farm or house; and he sued the "casual ejector," as the person who was accidentally selected to assist in turning him out was called. But neither of these gentlemen would have any interest in the controversy to induce them to prosecute it. They would naturally turn it over to their respective principals. The tenant would notify his lessor that the latter must prosecute the suit if he wished to recover the property; and the casual ejector would serve the like notice on the person really holding the possession, to make defence of his right. The suit would then proceed between these two. No doubt, in early times, the four parties were actual persons; but it long ago became realized that the tenant and the casual ejector were unimportant, yet, for the sake of having the legal relations completely represented in the suit, they were continued as nominal parties. John Doe, for instance, was named as the tenant, and Richard Roe as the casual ejector. And thus was perpetually preserved the memory that there might have been, if there were not, a tenant forcibly expelled, and a servant hired to expel him, involved in the case.

The codes of procedure have, naturally, abolished these fictitious personages. Actual facts, not theoretic relations, are the guide in shaping the pleadings in a suit. Hence an action for lands is simply brought by the person who claims to recover them against the person who is holding them; and all such remedies as arrest for debt are regulated by distinct rules defining the cases in which they may be allowed, instead of by fictions rendered necessary to adapt ancient rules to new views and customs.

#### ABOLITION OF FORMS OF ACTION.

The same general reasons which led to the fusion of law and equity, and the disuse of legal fictions, induced the framers of the Code of Procedure to abolish forms of action. Under the

former practice of the courts, distinct "forms of action" were prescribed as appropriate to all ordinary lawsuits; and it was very necessary that an action should be brought in the right form. The distinction gave rise to a great deal of litigation which, upon modern views, is unnecessary. These forms were framed upon an idea of representing, in the framework of the suit and the statements made in the papers, the theoretic relations under which the case ought to be considered and decided rather than the actual facts out of which it arose. There were a number of these forms adapted to embrace the various controversies of usual occurrence. Often the attorney for the plaintiff might make a choice, or might even couch his suit in two forms, so as to be sure of prevailing in one. The system required, on the part of lawyers, a very accurate judgment as to the legal aspects of a claim, the principle of the law under which it ought to be placed. An inexperienced attorney was liable to err in judgment, and an expert one might easily be misled by incorrect information from his client as to the facts. Yet if, upon a trial, it appeared that, whether by the client's misstatement or the lawyer's misjudgment, the action had been brought in an improper form, the plaintiff was liable to lose his case merely for that reason.

Let it be supposed that a livery-stable owner let a horse to a customer upon the bargain that the customer might drive the horse to Neartown and back, to be gone not more than two days; but, instead, the customer drove him to Fartown, sold him, and appropriated the money. According to the theory of "forms of action," these facts might be regarded in three different legal aspects, giving rise to three claims of distinct natures, and belonging under separate heads in legal classification. In one aspect the case resembles that of a person who should find another's horse astray, and should appropriate him to his own use, instead of returning him to the owner. If the plaintiff's attorney took this view, his statement of the case would be, substantially, that the plaintiff had lost a horse, and that the de-

fendant had found him and wrongfully "converted" him to his own use. This was called "suing in trover." In another aspect, such a case resembles one where the owner of a horse has intrusted him to an agent for sale, and the agent has sold him, but refuses to pay over the money. If this view were taken, the statement of the case would be, substantially, that the customer had sold the horse at the request and for the benefit of the owner, saying nothing about any misconduct in the matter. This was called "waiving the tort and suing in assumpsit." In a third aspect, the case would stand that the horse was still the property of the livery-stable keeper, who might rightfully have the aid of a sheriff to retake him wherever he could be found. If this view were taken, the suit would be, not against the customer who hired the horse, but against the purchaser, and the statement would be, substantially, that this purchaser had unlawfully taken away a horse from the plaintiff's stable, and was wrongfully detaining him. This was called "suing in replevin." One peculiarity of the system was that the story of a case related in the pleadings seldom corresponded with the actual circumstances. It was not the theory of pleading to inform the court and jury of the occurrences out of which the controversy arose, but to set forth the legal bearings, to bring the case under the technical principles by which it ought to be decided. Thus, in the case supposed, old-fashioned pleadings might not say anything about the hiring of the horse and the wrongful sale. The service rendered by the plaintiff's statement of his case would be to show whether he wished to recover damages for the customer's misconduct, or the price which the customer had obtained on the sale, or to get the horse back again. Another peculiarity was that if the attorney erred in choosing the form of action, so that the legal right which he put forward could not be substantiated by the actual circumstances when they came to be related by the witnesses, his mistake might be fatal to the lawsuit. These features of the system gave rise to great waste of time and fre-



quent perversion of justice, as it often occurred that the testimony on the trial clearly showed that the plaintiff had been wronged by the defendant and ought to have compensation, yet, because his lawyer had brought the suit in the wrong form, judgment must be rendered against him.

A notable instance of the time bestowed upon these theoretic discussions is the squib case.\* There was a fair held in the town of Milbourne in 1770, and a large crowd of people assembled in the chief street and the market-house of the town, engaged in promenading, buying and selling, and various amusements characteristic of fairs. A careless youth named Shepherd lighted a squib and threw it, from the street where he was standing, into the market-house. It fell upon the stall of a gingerbread seller, and began to blaze in the face of a bystander named Willis. He instinctively snatched it and threw it across the market-house, when it fell upon another stall kept by Ryal. He in the same manner, acting without time to think, and only with the instinctive purpose of saving his goods, caught up the squib and threw it across the market-house again. It struck a boy named Scott, who happened to be standing in its way, in the face; and, as this was just at the time when it burst, one of Scott's eyes was destroyed. The true question for a lawsuit upon facts like these would seem to be, whether boys who throw lighted squibs about the streets are responsible for all mischief any squib may do in its devious course, or only in the event of its harming the person at whom it is particularly aimed. There was a long lawsuit in this case. It excited able argument, elicited lengthy opinions of judges, and produced several reports in the books, and has been recommended to law students for study ever since. But the question discussed and decided is not the justice of giving compensation to a person who loses an eye by such reckless conduct, but whether the action should be in the

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\* *Scott v. Shepherd*, 2 W. Black. 892.

form of "trespass," or of "trespass on the case." The defence was not that Shepherd was not to blame, nor that Scott was not entitled to damages, but that the action was brought in the wrong form. Fortunately for justice, the judges were able in this instance, by acute reasoning, the details of which would not be interesting here, to satisfy themselves that the form adopted was allowable, and Scott was allowed to proceed and to prove and recover damages. But in innumerable instances, not only was the time of the courts consumed in these purely theoretic discussions, but justice was frustrated by the result.

The codes of procedure abrogate these technical forms. All lawsuits are brought in one and the same form—a civil action. The plaintiff's statement of his case consists of setting forth simply and plainly the actual facts, and the court and jury, when the cause comes to be tried, enter at once upon the inquiries: What are the true facts of the case? and, what redress ought the plaintiff to have?

#### AND OF "SPECIAL PLEADING."

Is it practicable to give a sketch of special pleading which shall be reasonably correct, yet untechnical? Probably not. Yet there is the familiar story of the old lady sued for breaking a borrowed kettle, who pleaded: 1st. The kettle was cracked when I borrowed it; 2d. It was whole when I returned it; 3d. I never broke the kettle. This is as untechnical as any case in the reports by Joseph Miller; yet it is the acme of special pleading. If the routine was pursued, the plaintiff probably demurred to the first and second pleas, and argued that on proving the breaking of the kettle by the lady he ought to have damages, notwithstanding she might have borrowed it for mending and brought it back repaired; and, while the court was cracking that nut, he interposed to the third plea a "replication." This probably stated that defendant wrongfully, and with force and arms, struck the kettle of plaintiff many violent blows with a certain

metal instrument called a hammer, and thereby broke and destroyed the same; and so on, giving in different "counts" several versions of the occurrence: now that it was a pail that was broken, again that it was a stone or a club that was used, etc.; so that, no matter what particular narrative of the affair the witnesses might give, there might be a statement to correspond with it in the pleading. To this the defendant would make a "rejoinder," saying, in effect, that the plaintiff was a dealer in kettles; that the defendant went to his store to purchase one, and had the right, by the usage of dealers in the place, to test the kettle offered her by a moderate stroke with a hammer, which she did; and that the kettle broke by reason of its being weak and defective, and not through any fault or misconduct of the customer. Then would follow a "surrejoinder" from the kettle-dealer, saying that the test-stroke given by the customer was not a gentle, moderate one, such as the usage allowed, but was excessively violent. Here, if a prompt, fair trial of the cause were desired, the defendant's attorney might well "join issue," simply denying the excessive violence.

The advantage of this system of successive special pleas consisted in its narrowing as much as possible the question to be tried; in simplifying the issue, i. e., limiting as much as possible the duty of the jury. Thus, in the case supposed, the only question for discussion upon the trial would be whether the blow was extravagant and violent or was only a reasonable testing. There would be no necessity of prolonged inquiry whether plaintiff was owner of the kettle or defendant the person who broke it. These facts would stand admitted. In many cases, and when legitimately employed with the honest purpose, on the part of both attorneys, of bringing to light the true question, the system was undoubtedly admirably adapted to diminish the labors of courts in trying lawsuits. On this account, and because of its logical accuracy and philosophic precision, it was very long a favorite even among high-minded, public-spirited jurists.



Astute, crafty, unscrupulous practitioners liked special pleading for an opposite reason: it gave them many opportunities of diverting less skilful opponents from the true question, and of substituting for trial one having little or no connection with the real justice of the case. Thus, let it be imagined that, in the kettle case, the dealer's lawyer was doubtful whether he could prove excessive, unreasonable violence against the customer. If, however, he could tempt the customer's lawyer away from that issue by the crafty suggestion of some other matter of defence, he might win a victory, notwithstanding the real weakness of his case. Suppose, then, that he, having knowledge of some out-of-the-way facts in the local history of the town, instead of tendering in his surrejoinder an issue on the substantial question whether the customer was too violent in striking the kettle, should make the statement that the usage in the borough of Kettleton, of allowing kettles to be tested with a hammer, was always limited, by the dealers, to articles in brass, copper, and wrought iron; while the kettle in question was of cast-iron, and not within the usage, nor suitable to be tested by striking. The customer's attorney now might easily forget to deny that the blow was too violent, and might set forth in his "rebutter" that the rule and usage had been expressly extended to cast-iron ware by an ordinance of the mayor and corporation enacted in 1830. Here would come in play the opposite lawyer's local knowledge; for now he would interpose a "surrebutter" saying that John Brass, the pretended mayor of Kettleton in 1830, was then not quite of age, but a minor, not competent to be a mayor or to sign an ordinance; and that the ordinance asserted was therefore void. On this statement the customer's lawyer would join issue. But the issue now would bring up for trial only the question of the birthtime of John Brass. And the parties to the suit, coming to the trial prepared to relate their stories and free their minds of their grievances, would be gravely dissatisfied to find that nothing what-

ever was to be said about the kettle or the cracking, but the day's work was to consist merely in submitting the certificate of John Brass's birth to show whether or not he was of full age when elected mayor. For if the plaintiff's attorney should argue that, even if the customer had a right to test the kettle, the dealer ought to have damages on proving that she did so with extravagant violence, the judge would pronounce that question not in issue; and declare that he could try only the single question presented by the pleadings—the age of John Brass. Another objection was that unscrupulous attorneys could gain great advantage from errors or variances. Accuracy was of the essence of special pleading; and mistakes were fatal. If, for example, in the certificate of proof of birth produced in evidence, Kettleton happened to be written Nettleton, or 1830 given as 1820, the judge would brush the paper aside because of the "variance;" for when, in matters of description, the party was not able to prove exactly what he had pleaded, he was not allowed to prove the truth, and recover according to that, but lost his case altogether. These two features of special pleading rendered it a favorite system with skilful, experienced, yet not particularly high-minded practitioners; for it gave them many opportunities of winning a lawsuit, irrespective of the justice of the case, by means of distorting the issue or taking advantage of discrepancies. Thus the system had friends and supporters among lawyers of various classes.

The codes of procedure discard the whole system of special pleas, including their ultimate purpose of narrowing issues to single specific points stated before the trial; and they give liberal leave to amend or disregard errors and variances. The pleadings commence with a complaint which states, in ordinary and concise language, the facts in the plaintiff's case, and what he expects to recover. The defendant answers, either denying what the plaintiff has alleged, or, if it is true, stating his justification or excuse for what he has done. These are, usually, all

the pleadings which are required. They show the general nature of the claim and the defence, which straightway come before the court and jury to be tried, and just judgment is rendered according to the true facts as ascertained by a careful and liberal inquiry. It sometimes happens, indeed, that the defendant sets up a cross-claim against the plaintiff; when this is the case, the plaintiff interposes a "reply" stating his answer to the cross-claim. But beyond the reply the pleadings do not extend.



## CHAPTER XXII.

## THE CIVIL DAMAGE LAWS.

To hold the seller of liquor responsible to pay damages for any mischief done by a drunken man seems a stringent rule, yet this principle has become established law in at least half of the States.

## A STRIKING INSTANCE.

The story of a lady of Jones County, Iowa,\* well illustrates that it is possible, by means of such a rule, to remedy some part of a wife's loss through her husband's intemperance. The early years of her marriage were happy and prosperous. Her husband was possessed of considerable property, and was successful in a business from which he realized an income of \$1500 a year. But habits of drinking fastened themselves upon him. He does not appear to have been a gross drinker of spirits; wine and beer were his principal enemies, but these, excessively as he used them, impaired his powers, unfitted him for labor, and rendered him a confirmed drunkard. There were in the town no less than eight saloons which he frequented in turn, and upon which, after his earnings dwindled to nothing, he was squandering his capital. The wife visited the saloon-keepers and urged them to cease supplying her husband with liquor. Some of them assented; but the husband, on learning why it was refused to him, declared to her that if the prohibition were not removed he would abandon her and carry away their child. Under this compulsion, she went with him to the saloons, and reluctantly gave some consent that liquor might be sold to him.

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\* *Jewett v. Wanshura*, 43 *Iowa*, 574.

When she had done this, her prospect must have seemed dark. But, just in time for her relief, the law was passed declaring that the seller of liquor shall pay for the harm it does. She brought lawsuits against the eight saloon-keepers for the injury done to her in making her husband a drunkard, and reducing her from affluence to poverty. Most of them paid her something to stop the suits. One of them stood out and resisted her claim. The result was that the jury condemned him to pay \$1000, to reimburse the money her husband had squandered, and \$200 more by way of punishment.\* The dealer complained of this as unjust, because he had sold only beer and wine, and the wife had given him leave; and because \$1200 was too much in any case. The judges said that it was no matter what he sold, the husband was made a drunkard by it; that he might have known that a wife coming with her husband to say he might buy liquor, only came because he compelled her to do so—she did not really mean it; and that the verdict was not at all too high, considering the property and income the husband had lost.

#### GENERAL NATURE OF THESE LAWS.

This law declaring that the seller of liquor shall pay for the harm it does is what is called a Civil Damage law. Twenty-five or thirty years ago, at about the time when Maine, under the influence of Neal Dow, enacted her prohibitory law, then a new measure of temperance legislation, Indiana† and Ohio proposed, in contrast, this project of a law embodying the principle that as the seller of liquor derives the profits, he should pay the dam-

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\* These are the sums stated in the official report: an earlier account of the case was that the lady recovered \$10,000 actual and \$2000 punitive damages (8 Chic. Leg. N. 324; Lawson's Civ. Dam. L. 40); but these figures are, probably, a misprint.

† The Indiana law (1853) seems to have been regarded as repealed by the unintended effect of a prohibitory law passed in 1855. The Ohio law (1854) has very generally been regarded as the original type of these statutes.

ages. It allowed the losses directly attributable to the sale of liquor to be charged to the seller. It gave an action of damages against him in favor of persons injured by the intemperance he promoted. Whoever suffered from the drinker might sue the seller. The experiment met with success, and the principle has been extensively introduced, with varying modifications.

To take the New York law \* as a specimen of these enactments, it reads as follows: "Every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name against any person or persons who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons."

The language of the corresponding laws in other States differs, and auxiliary provisions vary; but the substance is about the same. One difference, however, is important. In a majority of the States which have adopted the Civil Damage law, no notice is taken whether the sale was or was not a lawful one. The saloon-keeper may obtain a license, comply with all the requirements of the law, and make only sales which the law permits, and yet be sued if the buyer becomes drunk and does damage. This is the policy adopted in New York, also in Massachusetts, Illinois, Nebraska, Iowa, Kansas, Michigan, Ohio, and Wisconsin. It is no defence to a suit for civil damages that the tavern-keeper was selling according to law. Not so in Connecticut, Indiana, Maine, New Hampshire, Pennsylvania, Rhode Island, and Vermont. In these States the seller is only liable for damages where, in selling, he has violated the law. The State imposes strict regulations upon the traffic; if the dealer obeys them, he is not chargeable. If he breaks them, as by selling on Sunday,

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\* Laws of N. Y., 1873, ch. 646.



neglecting to take a license, giving liquor to a minor, or the like, then it is that he may be sued for any damage done, as well as prosecuted for the penalty of the law. To give an example of the laws founded on this policy, the Vermont law\* reads as follows: "Whenever any person in a state of intoxication shall wilfully commit any injury upon the person or property of any other individual, any person who by himself, his clerk, or servant shall have *unlawfully* sold or furnished any part of the liquor causing such intoxication shall be liable to the party injured for all damages occasioned by the injury so done."

Another difference of interest is that in several of the States—Nebraska, Ohio, and Wisconsin, for example—the law is so framed as not to apply unless the dealer has been notified not to sell liquor to the particular customer.

A third feature which distinguishes the laws of a few of the States—Massachusetts, New York, and Ohio have laws of this kind—is that the landlord or owner of a building who leases it, knowing that it is to be used for a liquor-store, is exposed to substantially the same liability as his tenant for all injury caused by the sales made.

#### HOW THEY OPERATE IN FAVOR OF WIVES.

Disregarding, now, these variations, and speaking of the operation of the law in its more stringent form, the general idea is seen to be that any one who sustains "injury in person, property, or means of support" from any intoxicated person may sue the seller of the liquor for damages. Let the dealer sell at his own risk. He makes the profit, let him pay the loss. Whether the sale were lawful or unlawful, or even if the liquor were given, any person who has been injured through another's intoxication may sue the seller or giver of the liquor, whether proprietor or bar-keeper, owner of the building, or some companion "standing

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\* Acts of Vt., 1869, No. 4.

treat." Laws thus framed have been found to embrace in their practical administration a wide range of the pecuniary evils attributable to intemperance, and to afford redress for a great variety of injuries.\*

As the wives of drunken husbands form the most numerous class of immediate pecuniary losers from intemperance, so they are most frequently plaintiffs in these actions. These laws give a wife a prospect of partial redress in many grievances. No law can relieve from the sense of disgrace, or can assuage or compensate the sorrow, alienation, and wounded feeling with which a conscientious, affectionate, high-minded woman comes to realize that the husband of her early love and choice is steadily and surely descending the hill towards the depths of degradation which lie below the drunkard. And in instances where neither personal injury nor pecuniary loss has been alleged, but only mental suffering, the courts have said that the law did not apply. Abusive language from the husband does not warrant suing the seller of the liquor. In one case a wife's complaint was that in consequence of his intoxication her husband became delirious, wild, and dangerous, compelling her to nurse and attend him; and that she had suffered from fear, and from his society being made disagreeable. But the court said these were not personal injuries. But it is something to know that if the husband, being drunk, beats the wife, or treats her with actual personal cruelty, she may hold the man who sold the liquor to a legal responsibility. So she may, if by threats and abusive demeanor he terrifies her into a room and locks her there to suffer, or drives her from the house and fastens her out to roam houseless through the night, or seek shelter where she can. These are physical injuries which the law can estimate and compensate.

Again, if a husband squanders property of the wife in fits of

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\* Most of the decisions mentioned in this chapter may be found collected in *Lawson's Civ. Dam. Law*.

intoxication, she can compel the seller to respond for her loss. There was in New York State a cripple who enjoyed a pension. He had a wife and four children; and, as his infirmity embarrassed his working, the pension was nearly all their support. Upon one occasion, after drawing the money, for which he had to go to a town at some little distance from their home, he stopped at a hotel, drank liquor, became too intoxicated to take care of himself or his cash, and reached home badly hurt and minus fifty dollars. Nobody supposed the tavern-keeper took the money; it was probably stolen by some stranger. But the wife sued the tavern-keeper for making the husband drunk. And the decision was that he ought to pay her a fair share (one sixth) of the money lost.\*—A drinking husband got possession of a hundred dollars belonging to his wife, went upon a spree with it, drank (with how much assistance from boon companions is not stated) more than it would pay for, went home, took his wife's horse from the barn, and sold it to pay the balance of his score. The tavern-keeper was adjudged to make good the wife's loss. The same thing has occurred in another case, as to the horse, where there was no money involved in addition.

Then, again, most of these laws declare that a person who is injured in "means of support" may sue. "Injury to means of support" is a broad expression. But the courts generally have held that if the wife loses means of support from her husband's earnings by reason of his habits of intoxication, the liquor-seller is responsible. The New York Supreme Court has decided differently. But in other states the courts have considered that as a husband is lawfully under obligation to labor to support his wife, his capacity to work is a part of her means of support, and whatever diminishes his power of earning injures her means of support. Under the Civil Damage laws, she is considered to have an interest in his business ability; at least, in all cases where

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\* *Franklin v. Schermerhorn*, 15 N. Y. Supreme Ct. 112.



she has not independent property, but relies on his exertions for her maintenance. This embraces his power of earning money enough not merely for absolute necessities, but for comforts, according to the condition and station of the family; and it extends to his health and intelligence in so far as they are needed for his earning a support, and may be depreciated by intoxication. In other words, a husband's wages are a wife's support. If he earned good wages while sober, but, while intoxicated, lost work and wages, and the wife was by this brought to suffer, the seller may be sued for the difference. A laboring-man, earning when sober a dollar and a half a day, fell into drinking habits which caused his death within the space of about three years. His wife sued the seller, and recovered, chiefly for loss of support, two hundred dollars.—If a husband becomes insane or a useless invalid through drink, his wife can collect damages for the loss of her maintenance. One drunken man fell from a wagon, and was hurt so badly as to need a doctor, and to keep his wife up at night nursing and watching him, until she was sick herself from overexertion and want of sleep, and, after all, he never became well enough to carry on the farm-work as he formerly did. His wife recovered damages for her time in taking care of him (two dollars a day), for her own sickness, for the doctor's bills, and for the wages of the man hired to do the husband's work on the farm.—If intoxication causes a married man's death, his wife recovers damages, much as she might if he were run over by a railroad-train or killed by careless blasting of rocks. This is seen in a case where several men, drinking together, engaged in a fight, and one was killed. His wife recovered damages from the saloon-keeper.—How far this rule extends is a vexed question in the courts. Where the victim became so drunk that he had to be carried home in a wagon, and on the way a barrel of salt in the wagon fell on him and killed him; and where he was stumbling across a railroad-track, unable to take care of himself, and was run over and killed, the courts adjudged that the seller

was not liable; for, said the judges, the man's death was not produced by selling him liquor, nor by his intoxication, but he was killed by the barrel of salt or the train of cars. The intelligent reader, unacquainted with the intricacies and uncertainties of legal decisions, will say that he perceives no difference in principle between these cases and that of the man who was killed in the bar-room fight. The difference very probably is that the suits were in different States or courts, and were decided under statutes not alike, or by judges whose views varied. There is not any good reason in the nature of the three cases why they should be differently adjudged.—There was a singular case in Illinois,\* which was decided in favor of the dealer. The drunkard became irritated and quarrelsome, and commenced a disturbance in the house of a neighbor, who drew a pistol and shot him, wounding him in the leg. Surgeons were called to treat him, who told him that he must not try to walk while the wound was healing. He, however, disobeyed them, and limped about the house; and this brought on inflammation. The surgeons then thought it necessary to amputate the limb, and did so; but their patient died; and after-testimony showed that the amputation was not proper: under the circumstances, the patient's chances of recovery would have been better without it. The widow, however, sued the tavern-keeper; for she argued that if her husband had not been made intoxicated, he would not have made the disturbance, and then he would not have been shot, and then the surgeons would not have made the mistake of cutting off his limb, and then he would not have died. But the court said this was too far-fetched; the man died from the operation, not from the spree.

#### OR OF OTHER PERSONS.

Wives are not the only persons who bring these suits. A parent or a child, a husband, an employer, any person, indeed,

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\* *Schmidt v. Mitchell*, 84 Ill. 195.

may make these claims. Fathers may sue. A young man borrowed his father's horse for a drive. On his way he visited a liquor-saloon, became excited with liquor, started again quite unfit to manage the horse, and drove it so violently that it died. Verdict for the father for the value of the horse.—The only son of a farmer, being upon a journey, drank at one tavern after another till he became unable to walk. He sustained two falls, in which his head was severely bruised, and from the effect of these he became sick and insane. Verdict for the father for the expenses of medical treatment and for the value of the son's services lost during his sickness.

Children may sue. Quite recently a culprit named Wall was brought forward to be sentenced for manslaughter in kicking his wife so that she died. The only element in the case to save him from a conviction for murder was that he was so much intoxicated as not to know what he was doing, hence there was no intent to kill. His counsel asked for the shortest sentence of imprisonment allowed by law, on the ground that there were four little children, who, now their mother was dead, would have no support during their father's imprisonment. But the judge disregarded this appeal. He said that the Civil Damage law imposed on the men who sold Wall the whiskey severe damages in favor of the children, and enabled them to bring an action for the loss of their father's and mother's earnings and care. And he gave a sentence of fifteen years.

A husband may sue. An intoxicated young man took his mother-in-law to ride, but drove so recklessly as to upset the wagon, throw the lady out, and break her arm. Her husband—the father-in-law—brought suit for the doctor's bill, nurse's wages, and loss of his wife's services while her arm was healing, and the court sustained his suit.

An entire stranger may sue. A drunken man attacked and beat one whom he met, and injured him so that he was thrown out of work for a considerable time. The injured person sued



the owner and landlord of the building where the rowdy bought the liquor, and the court sustained his action.

One other rule may be important. These laws appreciate the truth that not all the damage done by rumselling can be brought to strict proof. Accordingly juries are not limited to the very damages proved. Some actual injury must be shown ; but after this is done, the jury may give additional damages if they think the seller deserves punishment.

Of course these cases have not been put in force without great opposition, for it throws a heavy risk and responsibility upon dealers. They have objected strongly that the law interferes with their right of property, for, they say, the essential idea of owning property, whether it is liquor or any other thing, is to be able to sell it freely. But the courts have overruled this, and have said that the plan of a Civil Damage law is perfectly just and constitutional.\* It does not take away the dealer's property or hinder his selling it, but only makes him responsible for the natural consequences of his sales. A legislature has authority to impose conditions and restrictions upon the traffic such as are necessary to promote the general peace, happiness, and welfare of the people of the State.

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\* *Bertholf v. O'Reilly*, 74 N. Y. 509.

## CHAPTER XXIII.

## CRUELTY TO ANIMALS.

It is curious to learn in how different a light animal life has been regarded in different ages and by different races.

## VARIOUS VIEWS.

In some countries animals have been deified, or scrupulously protected upon the strictest religious grounds against every form of abuse or harm. This is the rule in India, and wherever the creed of Buddha prevails. Even noxious insects may not be killed. Animal life is sacred. London papers, a few years ago, mentioned a suit between two servants of a Calcutta native merchant who quarrelled over the division of their pay for "feeding bugs." The magistrate's inquiry elicited that the native merchants were much annoyed—this is nothing new—by certain pestiferous insects at night. But religion forbade these should be killed—this is a novel view to Americans. Hence servants were employed to sleep (lie awake, more likely) in the employer's bed an hour or two before his time for retiring, that the vexing appetite might be somewhat cloyed, and the master have a better chance of rest. It was the wages for this service of respect to the sacredness of insect life that the quarrelling Hindoos could not divide.

Another aspect of this topic is that, four or five centuries ago, upon the continent of Europe, animals were treated as responsible beings, amenable to legal proceedings and punishments. They were arrested and brought before courts to answer for crimes, and meantime were shut up in prison. The public prosecutor prepared a formal accusation, and a counsellor was select-

ed to plead for the defendant. Witnesses were examined, and judgment gravely pronounced. If the accused animal was found guilty, the judge passed sentence of death, and this was executed with great formality, and in a variety of ways, the offending beast often being dressed in the clothing of a man. Antique European law-books contain reports of trials of swine, bulls, horses, etc., in public courts, for the offence of killing persons, and they were gravely hanged for their misdeeds.\*

The ecclesiastical courts of four and five centuries ago had appropriate forms of proceeding against creatures whose prolific numbers forbade their being arrested and punished individually. Rats, in one case, were cited before the ecclesiastical tribunal for devouring the barley of the region, and their counsel established a successful defence; in substance, that his clients desired to retire from the territory, and would have done so if allowed, but had been prevented by the multiplicity of cats lying in wait to destroy them!—Western farmers troubled by grasshoppers may find a hint in a case where the locusts were prosecuted for their ravages, and a sentence of anathema pronounced against them.—In Mayence the Spanish flies, and in Savoy the weevils, were indicted at a public trial. Their counsel succeeded in obtaining a decree that a distant territory might be assigned them to which they might retire! A good precedent for the Colorado potato-bug.—In Valence a plague of caterpillars was prosecuted. The points of law raised were so numerous and difficult, and the trial was spun out so long, that the insects all died before judgment was pronounced!—Instances of this procedure are found as late as the earliest settlements in America. In Brazil there was a case of proceedings against swarms of ants; and in early Canada, turtle-doves were excommunicated for mischief they had done.

Another aspect of this topic is the doctrine of transmigration of souls. This tenet is that, upon the death of a human being,

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\* Many such cases are narrated in Agnel's *Procès contre les Animaux*.



the animating principle, or soul, passes into the body of some animal; and, upon its death, into that of another; and, after a long series of such changes, will return to the original form. This is a very ancient belief; it is popularly attributed to Pythagoras, yet he derived it, probably, from the Egyptians. It involves, as a consequence, that the same respect is due to the security of animal life as is paid to that of man; for he who hurts an animal is really inflicting pain or injury upon the soul of some man. This idea has not been abandoned. In one form or another it is held by many millions of people of races deemed heathen; and it has been avowed by individuals among civilized nations. In particular, this was the faith of Louis Bonard, a French gentleman who died in New York city in 1871, and who bequeathed a large fortune to the American Society for the Prevention of Cruelty to Animals, an institution which had been for a few years endeavoring, with limited means, but with remarkable efficiency and success, to introduce a reform in laws and conduct affecting the brute creation.

#### THE VIEW TAKEN BY THE COMMON LAW.

Early English and American law never recognized animals as either worthy of any such regard or amenable to any such responsibility as is above described. One or two instances in which such ideas have been discussed in the courts are entertaining. There was, for instance, the great case of the New York dog-fight.\* It was commenced, as great cases sometimes are, in a little justice's court, where the owner of a dog killed in a dog-fight recovered a verdict for twenty-five dollars and costs against the owner of the other dog. The case was appealed to the Supreme Court, where the cause came before that eminent humorist, Judge Allen. He reversed the judgment. He said, "The branch of the law applicable to conflicts and collisions be-

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\* *Wiley v. Slater*, 22 *Barb.* 506.

tween dog and dog is new to me. I admit total ignorance of the *code duello* among dogs, or what constitutes a resort to arms, or rather to teeth, for redress. Whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight, or what violation of the rules of etiquette, entitle the injured or offended beast to insist upon prompt and appropriate satisfaction, I know not; but I am glad to know that it is not claimed upon either side that this struggle was not dog-like and fair. Indeed, I was not before aware that it was alleged that any law, human or divine, moral or ceremonial, common or statute, undertook to control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domesticated state; that it was one of their reserved rights, not surrendered when they became a part of the domestic institution, to settle and avenge in their own way all individual wrongs and insults, without regard to what Blackstone or any other jurist might write. Moreover, the defence is not rested upon the principle of self-defence, which would have raised a novel question as to the liability of the offending dog for excess of force, and whether he would be held strictly to proof of the necessity and reasonableness of the force exerted, under a plea that in defence of his carcass, or of the premises committed to his watch and care, 'he did necessarily a little bite, scratch, wound, tear, devour, and kill the plaintiff's dog, doing no unnecessary damage to the body or hide of the said dog.'"

After thus explaining that the liability for the results of a dog-fight does not in any manner depend on the question which dog was in fault in the particular contest, this being a matter which the law does not aspire to ascertain, he proceeds to explain the real principle involved, thus: "There is no evidence that this dog was a dangerous animal, or one unfit to be kept. The cases in which dogs have attacked human beings, although trespassers, and the owners have been held liable, are not applicable. It is one thing for a dog to be dangerous to human life, and quite

another to be unwilling to have strange dogs on the master's premises. To drive these off is a virtue. Owners of valuable dogs should take care of them proportioned to their value, and keep them within their own precincts or under their own eye. If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly if they go uninvited, they must be content to have them put up with dog-fare, and that their reception and treatment shall be hospitable or inhospitable according to the nature or the particular mood and temper at the time of the dog visited. The courtesies and hospitalities of dog-life cannot well be regulated by the judicial tribunals of the land. I can see no just grounds for this judgment."

In one instance a monkey was arrested on a charge of assault and battery. The newspapers of the day narrate the case thus:

On the arraignment of the prisoners in the Tombs Police Court, a monkey was led by his Italian owner to the bar. He climbed nimbly to the railing which separates prisoners from the magistrate, and, chattering volubly, doffed his cap and bowed to the justice with profound gravity. "What is this?" the justice asked.—"A prisoner," answered a policeman. "His name is Jimmy. I arrested him for assaulting Mary Shea."—"A monkey arrested for assault!" exclaimed the justice. "Where is the complainant?" Mary Shea stepped forward. She unwrapped and exhibited a sadly lacerated finger, and explained that she kindly offered Jimmy a piece of candy, but he grabbed her finger and bit it. "What did the man do to you?" asked the magistrate. "Nothing, your Honor!" said Mary; "but, sure, he owns the murdering baste!" The Italian owner protested that he was not even present at the casualty; but that the monkey was wildly fond of candy, and, in his frantic eagerness to bite the piece offered him, had unintentionally bitten the finger instead. "If Mr. Darwin were prosecutor in this case," remarked the judge, "he might, perhaps, convince me that the statutes authorize imprisoning monkey criminals; but, sitting alone, I do not think



I can lawfully commit Jimmy."—"And is there no law for monkeys?" expostulated Mrs. Shea.—"None whatever, ma'am," answered the justice; "what do you think ought to be done to him?"—"Why, sure, I think he ought to be locked up."—"But we cannot imprison a monkey. Your only remedy is to bring a civil suit against the owner for damages."—"And is there no justice to be had against the miserable brute?"—"There is no law which makes a monkey criminally punishable for biting. The monkey is discharged," concluded the justice; and all departed, Mrs. Shea murmuring, "This is a nice country for justice!"

The dog-law of Michigan declared that "any person" might kill a dog found running at large without a collar marked as the law required. A small dog strayed away from home without his collar, and a large dog whom he met flew at him and killed him. There was a lawsuit, for the small dog was a valuable pet, and the lawyers for the big dog's owner cited the law, and argued that their dog had the right to kill the other because the latter was at large without a collar. But the court said it would be preposterous to consider their dog in the light of a person exercising a statutory authority.\*

It was quite consistent with the general view of regarding animals as merely things that the early English law, upon which ours is founded, allowed very little support to efforts for protection of animals. To injure an animal which belonged to another man could, indeed, be prosecuted as a breach of the owner's right of property. And abusing an animal in public view was punishable; such conduct was a nuisance; for it was either shocking or demoralizing to those who witnessed it. But beyond these rules there was no clear rule for the punishment of cruelty. A man might torture an animal belonging to himself, within his own private premises, and go free of punishment.

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\* *Heisrodt v. Hackett*, 34 *Mich.* 283.

## RECENT LEGISLATION.

Hence the American Society for the Prevention of Cruelty to Animals has, from the commencement of its labors, found a necessity to plead for a reform in the law itself. Under the executive leadership of Mr. Henry Bergh and the professional counsels of Mr. Elbridge T. Gerry, it has accomplished not only a routine enforcement of existing laws, as indicated by the reports of arrest and trial of car-drivers, stable-proprietors, pigeon-match makers, and others, but also important measures of new legislation. Its efforts have developed and crystallized in laws and decisions what was doubtless a growing thought in the community—the view that sentient life should receive protection for its own sake; that cruelty deserves punishment as intrinsically wicked. A series of enactments has been secured in New York, culminating in a general provision by which any person who is wilfully concerned in any act or neglect causing unjustifiable suffering or death to any animal, or, as the law explains that word, living creature, is punishable. And special provisions of law cover specifically the more ordinary and salient forms of abuse—fights between animals; swill-feeding of cows; transporting or impounding live-stock without prescribed food and rest, or in an inhuman manner; abandoning useless animals to die uncared for; overdriving or overloading beasts of burden; ruining horses' feet by salting the streets after snow-storms, and similar acts.

Nearly all the States have followed the example—have enacted like laws and organized similar associations. And efforts of the same character have been made in foreign lands. There were, not long ago, two hundred and twenty-nine of these societies, working in co-operation, guided by common principles and laboring upon homogeneous methods, for the repression of cruelty throughout the civilized world.

## CHAPTER XXIV.

### LOTTERIES.

THOSE persons who doubt whether the principles of Christian morality are really making progress, who fear that mankind, amidst the apparent growth of civilization, is growing worse instead of better, may find some comfort in the modern suppression of lotteries.

#### HISTORY OF THE PROHIBITION.

To discern the evil of lotteries and act upon the knowledge is one of the advances of modern times. They date from 1530 in Europe; and the general decision in England and America to prohibit them entirely was reached about 1830: it took society three centuries of experience to learn that they were utterly bad. A century or so ago, there are said to have been in England four hundred lottery-offices, and the business was approved and popular. A heavy tax, soon afterwards laid upon them, diminished the number to about forty. For half a century they continued to be used, under authority of law, as a legitimate mode of raising funds for public objects. A considerable contribution to the early endowment of the British Museum, and another in aid of the Virginia colony, were raised in England by government lotteries. But adverse laws put them, early in the present century, completely under ban. They were extensively used, and with legislative and popular approval, in our States for a long time. Through the first half-century of New York's existence as a State, to run a lottery was treated as a sort of franchise, like banking, which, to be sure, must not be free to everybody, lest it might be abused, but should be granted by the State as a sound



means of raising endowments and funds for public purposes. And lotteries were authorized again and again for such objects as the erection of public buildings ; opening great roads ; improving the navigation of the Hudson ; promoting literature ; and for endowing Union College, the Orphan Asylum in New York, and the Fairfield Academy. It was in 1833, less than fifty years ago, that lawful lotteries in New York were brought to an entire close. At the present day the very constitutions of nearly thirty of the States utterly forbid these enterprises in all forms.

#### WHAT IS A LOTTERY.

The case of the "Great Miltonian Tableau of Paradise Lost, or the Rebellion in Heaven,"\* illustrates that a lottery is not always christened by that name. This was a New Jersey scheme. The exhibitor advertised that eight hundred prizes would be distributed among the audience thus : After the exhibition he would go upon the stage and call numbers at random, and the holder of the ticket corresponding to any number called should come forward. If the exhibitor liked his appearance and believed he would recommend the show among his acquaintances, he should receive a present ; but if his appearance was not satisfactory, then no present for him ! There was to be no obligation of giving prizes to any one. The scheme drew patronage enough to draw the attention of the authorities, which shows how far human credulity will go when an offer of a prize by chance is offered. And the court pronounced it a lottery, which shows there may sometimes be difficulty and embarrassment in deciding the question What is a lottery ?

The popular idea is that of a chance distribution of money prizes. A "raffle" for a Christmas turkey, a "distribution" of paintings among shareholders by lot, a sale of "prize packages of candy," a "gift-enterprise book-sale," a "grab bag" at a Sun-

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\* State v. Shorts, 32 N. J. L. 398.

day-school festival, do not come fully within the general condemnation of lotteries. And there is some reason for a distinction. The money lotteries are not only more mischievous in effect, but intrinsically more deceptive and fraudulent. Merchandise can be bought at wholesale prices and distributed by lot without defrauding the buyers, if they value what they receive at its retail price. To conduct a distribution of articles by chance, so that each chance is worth what is paid for it, is not inherently impossible. It is impossible to do this with money prizes. To collect small sums from scattered ticket-buyers, mass them in large prizes, and arrange a scheme of drawing which shall at the same time accord to the ticket-holder a chance equal in value to the cost of a ticket, and to the manager any allowance for trouble and expense, is mathematically impossible. If ten men draw lots fairly for a gold eagle, each one's chance is worth precisely one dollar; therefore either he must pay more than a dollar for a ticket, or the manager must work for nothing. Thus a money lottery is necessarily a cheat. No fairness or impartiality in selling tickets, turning the wheel, and paying the prizes can possibly make it honest in the sense of giving the buyer of a chance an equal return for his money. If one hundred men pay ten dollars each into a common fund, and draw lots who shall take the whole, each man's chance, assuming perfect fairness in every step, is worth just ten dollars. If, therefore, even so much as the cost of a three-cent postage-stamp is deducted from the gross sum for expenses, the ticket-buyer's chance of prize is made less in value than the cost of his ticket. Most swindles are transactions which might be advantageous to the victim if honestly conducted. But it is mathematically impossible to gather small sums from the multitude, and distribute them in large prizes, without giving investors less in value of chance than they contribute in cash. If money is put up against money, there is no practicable margin for an honest profit, as there may be when property is offered against money. Hence money lotteries are what the popular

judgment chiefly disapproves, and there is just reason enough for the distinction to keep it alive.

The judicial notion is more comprehensive. Whenever laws forbidding lotteries have been questioned in the courts, they have been held to include all these various enterprises in one common condemnation. According to the judges, any scheme whatever for selling to the general public shares or chances in a distribution to be made by lot or hazard is a lottery, no matter what it is called, and no matter whether money, merchandise, or land is offered. The case of the American Art Union\* will illustrate the difference between the popular and the judicial view. That institution existed nearly ten years with public approval. The managers sold tickets or shares at five dollars each; these entitled the buyers to a steel-plate engraving and a year's admission to a gallery of paintings bought with the fund; and at the end of the year the paintings were distributed as prizes by lot among the shareholders. At last, however, the managers assumed to postpone the annual drawing beyond the promised time in order to sell more tickets. This gave dissatisfaction; there was an appeal to the courts, and they pronounced the scheme a lottery and broke it up entirely.

In one of the decisions in the Art Union controversy, a judge said that if persons already owning paintings or other property chose to apportion them by lot among themselves, this would not be a lottery. From this suggestion sprang the invention known as the "gift enterprise." A showman of the day, named Perham, advertised to give to all the buyers of tickets to his panorama, *en masse*, gifts of all kinds of merchandise, their disposal to be freely determined by vote at a public meeting of the ticket-holders. At that meeting they very naturally accepted a suggestion

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\* *Governors of the Alms House v. American Art Union*, 7 *N. Y.* 228; *People v. American Art Union*, 13 *Barb.* 577; *Bennett v. American Art Union*, 5 *Sandf.* 614.



to draw lots for the articles. This device was too clumsy and uncertain in operation to retain popularity in its original form. Similar schemes have been condemned. In Chicago, some well-meaning persons held a festival to raise money for building an Industrial College. They advertised to sell tickets to a course of lectures and concerts, and that at the end of the season they would distribute \$200,000 in presents among the buyers. The court said that this was a lottery.\* Likewise of the "gift sales" which have been common in many cities. The plan of one of these, in Concord, N. H., was that whenever a book was sold, the salesman consulted a numbered list of prizes, and if the number written in the fly-leaf of the book chanced to correspond with that set against any prize, the buyer of the book received the prize also. In a similar scheme in Chicago the dealer sold sealed envelopes for twenty-five cents each. These envelopes contained each a chance number calling for some article; it might be a piano, a watch, a sewing-machine, a ring, or a petty engraving; whatever it was, it would be sold to the holder of the envelope for one dollar. Both schemes were condemned, as were similar ones in North Carolina and Tennessee; so that courts East, West, and South are of one opinion.† Yet, unless cautioned, the general public might naturally advertise or correspond about such enterprises under the idea that they were not lotteries.

It has not been uncommon for a land speculator, when dividing a large tract into town lots, to reserve a few choice sites for distribution by lot among the purchasers of the others. Advertisements of such plans might easily find their way into public journals without being recognized as unlawful; yet, in at

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\* *Thomas v. People*, 59 *Ill.* 160. The same was said in the very similar cases *Commonwealth v. Thacher*, 97 *Mass.* 583; *Marks v. State*, 45 *Ala.* 38; *Negley v. Devlin*, 12 *Abb. Pr. N. S.* 210.

† *State v. Clark*, 33 *N. H.* 329; *Dunn v. People*, 40 *Ill.* 465; *State v. Bryant*, 74 *N. C.* 207; *Bell v. State*, 5 *Sneed*, 507.

least two instances where complaint has been made of this method of drawing attention to a land sale, the court has pronounced it a lottery.\* Upon some railroads a boy goes through the trains selling candy in "prize packages." The parcels all look alike; but he says that in some of them he has put presents, such as a locket, a pencil, a piece of money, etc. Many a passenger will buy a parcel, hoping to have the good luck of finding a prize, and without any idea of violating the law. But such peddlers have been condemned for carrying on lotteries.† At fairs and summer resorts one often sees a table with little partitions, in some of which are toys and trinkets of various value; and there is a wheel to be spun, so that if the index or pointer stops opposite a prize, the buyer of that chance to spin wins. This device is not popularly supposed to be a lottery, but it undoubtedly is one in law. And there is no reason, except mere toleration, why the same judgment should not be pronounced against numerous devices in popular use at church fairs and charitable festivals for coaxing money from a speculative public.

#### LOTTERY CORRESPONDENCE IN THE MAILS.

The foregoing explanations throw light upon the recent action of the Post-office Department regarding lottery letters. For two years past, the law of Congress has forbidden that letters or circulars concerning lotteries shall be carried in the mails. Yet postmasters have been at a loss how to enforce the law for want of knowing whether any particular letter does "concern a lottery." The letter, to be sure, is addressed to a lottery company, or to the agent of a lottery; but the postmaster cannot open it to see if it is upon lottery business. And there has been hesitation to condemn the letter on its outside address merely.

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\* *Wooden v. Shotwell*, 23 *N. J. L.* (3 *Zabr.*) 465; and 24 *N. J. L.* (4 *Zabr.*) 789; *United States v. Olney*, 1 *Abb. U. S.* 275.

† *Holoman v. State*, 2 *Tex. App.* 610.

This question has been considered with care in the Department with the result of a decision that letters need not be forwarded when they are addressed to lottery companies or agents as such. This is subject, it is true, to future action of the courts. A letter addressed to A. B. C. only must be delivered, although the postmaster may have heard that he is connected with a lottery. But if the address evinces that he is in the lottery business, still more if it is to a company, the authorities may take it for granted that the contents concern a lottery, and send it to the Dead-letter Office.

This will aid the extermination of these nuisances. They now maintain existence in some States which have not yet forbidden them, but depend for sales and profits largely on correspondence with victims in other States. Whatever hinders or prevents managers in other states from using the mails to sell tickets in New York or New England will deal the lotteries everywhere an efficient blow. It is also a worthy step forward—a welcome testimony of general opinion and national law against a swindling traffic.



## CHAPTER XXV.

## SUNDAY LAWS.

SUNDAY laws have had to bear some criticism and objection which they do not deserve, founded on the idea that they are designed to compel people to be religious. There is, indeed, some traditional ground for this, but it is an error.

## WHAT THEY MEAN.

A writer in the *Central Law Journal*, who seems to have examined the law-books extensively, says that every State in the Union, except Louisiana, has a Sunday law. The original and model of most of them is an English statute passed in 1676, while Charles II. was king. The language of that old law, and the histories of its time, indicate an idea that government might superintend the religious duties of individuals; that persons might be ordered by law to attend worship and maintain exercises and studies of piety at home. The title of the law was "An act for the better observance of the Lord's day;" and it commanded, in so many words, the people's "repairing to church" and "exercising themselves in the duties of piety and true religion, publicly and privately." It is probably true that when the colonies and the early States came to re-enact this law or to pass others like it, they did so in the view that the government might compel people to be Christians, or at least behave as such. That view harmonized well with what has been called the paternal theory of government. But it does not harmonize with the doctrine of popular government as developed in late years in this country; and, as far as Sunday laws are concerned, it is abandoned, unequivocally and completely.

There are, in the administration of civil law, many cordial recognitions of Christianity as being the prevailing religion, and some adoption of religious forms and observances as congenial and germane to legal proceedings; but any purpose of compelling or even inducing persons to observe Sunday as a day of pious obligation and observance is, at the present day, entirely disavowed. And it has become well understood among all who consider the subject disinterestedly that "Sunday laws" do not aim to control individual faith, or to secure for the first day of the week a religious observance. Probably a majority of the judges throughout the country believe, more or less distinctly, that God did set apart the seventh day as a day of rest and worship; that he has authorized some transfer of its sanctions, in their substance, to the first day; and that he sanctions a permanent consecration of the first day to religious uses by all mankind. But they hold such tenets as matter of individual faith and life only, and do not administer them as part of the law of the land. Whatever traces may be observed in ancient English or early American law of ecclesiastical rule or religious purpose in the laws governing conduct on Sunday have disappeared in modern law, as practically administered. The general belief that God desires Sabbath-observance is taken into view as a fact rendering legal protections of the day proper, but it is not a doctrine of the law. Sunday is named for the rest-day because the masses of the people have for centuries observed it, more or less fully, and the government can more easily secure and protect a day already popularly designated than establish a new one—not because law undertakes to enforce a divine command. Protection of individual liberty is the real object; the protection of the liberty of the many, for rest and worship, against encroachments or interruptions from the few. It is because the masses desire and need the day for rest that the law forbids the few to prosecute and exact continued labors. It is because the masses desire religious institutions that the law interposes to restrict on

one day the noise and bustle and excitement of the other six. *Vox populi*, not *vox Dei*, is the basis of the statute. Its purpose is to guarantee, impartially, that the masses shall enjoy a stated day during which there shall not be needless demands of ordinary business, or attractions and temptations of exciting amusements, or interruption of noise and tumult, preventing or hindering those from worshipping who wish to worship, those from meditating or studying who wish to do so, those from resting who need repose. In every community there are some persons who desire these things. The Sunday law seeks to give a moderate opportunity to enjoy them.

Consider how varied the preferences are! Some would pursue trade and amass wealth unremittingly. Some would luxuriate in a constant round of shows, refreshment-saloons, processions, excursions, Fourth-of-July fireworks, theatrical entertainments, avenue-trots, skating, sea-bathing, hunting, or fishing—would never grow weary (they think) of pleasure. Some would devote all their days to books and learning. Some wish to withdraw to religious retreats for lives of meditation and prayer. There are the sick and the aged, to whom the activities of the young and well seem always an irksome turmoil. There are a hundred intermediate types. Above all, there are those who desire and those who need a stated break in the wearying journey of life—a day of the gates shut down, that the pond may fill. All these tastes are considered, and the State strikes a balance and says, Six days shall be free for the pursuit of labor, business, and pleasure; and the quiet people must bear with the excitement and activity. One day shall be protected for the enjoyment of quiet and repose, and the active classes must submit to moderate restrictions. To suppose that the typical American Sunday law of the present day embodies any ecclesiastical rule, or any religious observance, is an entire mistake.

Moreover, there is satisfactory ground for saying that the purpose of these laws, as administered in the courts, is not confined



to protecting church service from interruption, but extends to preserving the day in its entirety, as a general rest-day. The theory is not that some persons wish to attend church, but that the community has a need that the masses should have a day of quietude. There is, to be sure, an element of protecting public worship. There are equally the uses of protecting the quietude of the household; of shielding the laborer from the coercive demands of competitive business; and of interposing a barrier between the young or the unoccupied and the allurements of exciting amusements. All these and other germane objects are within the policy of these laws as practically administered.

#### LABOR.

With respect to the question what work or labor may be done on Sunday, courts do not undertake to say what moral duty dictates, but what the laws prescribe or forbid. Now as these laws are distinct, and many of them quite different, in the various States, the decisions differ; the same kind of business may be lawful in one town and unlawful in the town adjoining, for the reason that a State boundary-line runs between the two. But these distinctions are in details. However the laws are phrased, and whatever particular things they may forbid, there is general agreement in this principle: to forbid ordinary business and labor, except works of necessity or charity. Probably few persons have practical difficulty in deciding what may be done by way of charity; but there has been much doubt and perplexity over "works of necessity." Necessary is a very vague word.

One view in which the judges have agreed is that the law does not mean that work must be "absolutely necessary," as the phrase is.\* The necessity meant is a relative one. Scarcely anything is absolutely necessary to be done, in the strictest sense. Says one judge, "If nothing but absolute necessity were in-

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\* *Flagg v. Millbury*, 4 *Cush.* 243; and see ante, p. 9.

tended, it would, in general, be unlawful to prepare a meal on the Sabbath; because it might without difficulty be previously prepared, or most people might safely enough fast for twenty-four hours. To supply gas-light would be equally unlawful, for people might use candles previously provided, or might retire to bed at twilight." Other judges have discussed this topic in many ways.\* The result of these discussions may be stated thus: The law contemplates that the community has a general need of rest on Sunday; most of the affairs of week-day life are less important than this need of a rest-day, and must be laid aside. But some wants of life and purposes of labor are recognized as superior to the need of abstinence from work. People may not agree as to what these are, but all will assent that there are some. These will differ in various communities and under different conditions. They are such as providing not only wholesome, but enjoyable, food; giving facilities for worship and for religious instruction; the supply of medicines, of medical attendance, and nursing for the sick; the prompt and reverent burial of the dead; police supervision; transportation of mails; prosecution of voyages and of processes of manufacture which cannot be begun and completed in six days. Necessary work includes all that is indispensable to be done on Sunday in order to secure attainment of whatever is more important to the community than its day of rest. Where the complaint was that a servant girl rode to her employer's house on Sunday morning to cook the breakfast,† and that a coachman harnessed the horses and drove the family to church,‡ the judges said that the work was lawful; the need of food and worship is superior to that of rest.

Another view adopted is that the law does not intend a personal necessity, but one arising out of the nature of the thing to

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\* See *McGatrick v. Wason*, 4 *Ohio St.* 566; *Morris v. State*, 31 *Ind.* 189.

† *Crosman v. Lynn*, 121 *Mass.* 301.

‡ *Commonwealth v. Nesbit*, 34 *Pa. St.* 398.

be accomplished, and the need of the community for it. That one is very poor and in great need of wages is not the kind of necessity that allows him to labor. There was a man in Arkansas who had a small wheat-patch, but was too poor to own a cradle needed for gathering it. He worked for neighboring farmers through the week in cradling their wheat, on Saturday night borrowed a cradle, and on Sunday cut his crop. The decision was that his being poor made no difference; there is no general necessity that wheat shall be reaped on Sunday, therefore no one may do it.\*—There was a shoemaker in Massachusetts who could not leave his work in the shop on week-days without throwing the other hands out of work, for they needed what he produced; so his garden got into a sad weedy condition. At last he obtained two days, Friday and Saturday, and worked all that he could, even by moonlight, till late Saturday night. But he did not get quite through; and yet he must go back to the shop on Monday morning. So he hoed the last few hills on Sunday. He argued that this was necessary work; but the judges said that the necessity was not of the right kind.† They have generally maintained that ordinary commercial necessities do not justify Sunday labor.—In one case the master of a vessel brought a cargo of coal to the port of New York, and the agreement was that if the owner of the coal did not receive and cart it away within six days, the ship should have extra pay for each day's delay. Instead of one week, six passed before the vessel was relieved of her cargo; and the master sued for the extra charge, claiming it for the six Sundays as well as for the week-days. The decision was that the coal-owner was not in duty bound to move his coal upon Sundays, and therefore Sundays should not be counted.—A somewhat similar question is decided in opposite ways: viz., whether, when the river is about to

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\* *State v. Goff*, 20 *Ark.* 289.

† *Commonwealth v. Josselyn*, 97 *Mass.* 411.



freeze, so that if the work is delayed navigation may close and prevent the voyage, cargo may be put on board ship on Sunday.

Another view widely established is that the Sunday law against work is not designed to prevent any lawful vocation altogether. Therefore if the nature of a business or a process is such that it does not admit of a cessation once a week, whatever is needful to be done on Sunday to keep it going is necessary. Examples are, the work of seamen on a voyage, the duties of a policeman or watchman, the prosecution of a manufacture which cannot be completed in six days or cannot be stopped and resumed. An Indiana brewer escaped a fine upon this ground. He proved that the process of malting barley was such that it required ten days, and any neglect during that time to turn it three or four times a day would spoil it. The court said that he might go into his brewery on Sunday and turn the barley enough to preserve it.\*—Probably the maple-sap cases rest on this ground. There have been two instances, one in Vermont and one in Indiana, where farmers who went out to their maple-trees to bring in the sap have been prosecuted. They said that the sap would not stop running, and the nature of the business did not allow of providing buckets large enough to hold what would flow in a day and two nights. The judges said that going to empty the buckets might be called necessary.† A man conscientious about obeying the fourth commandment would very likely submit to the expense of buying large buckets, or to the loss of what ran over from small ones. But the courts are agreed that they have nothing to do with a person's obeying the commandment; that is a question for his own conscience: the judicial duty as to Sunday work consists only in restricting it to what is required by the very nature of vocations more important than rest, or which cannot be suspended.

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\* *Crocket v. State*, 33 *Ind.* 416.

† *Morris v. State*, 31 *Ind.* 189; *Whitcomb v. Gilman*, 35 *Vt.* 297.

With respect to all those business matters which depend upon the course and events of nature, courts act on the common-sense principle that whatever can, by good judgment and forethought, be anticipated or postponed cannot be deemed necessary; but exigencies which cannot be foreseen, such as storms, shipwrecks, conflagrations, and the like, create a necessity. There was in Massachusetts a paper-mill the machinery of which became clogged in consequence of sand accumulating in the "wheel-pit." To stop the wheel on a week-day would throw the hands out of work; so a man volunteered to dig out the pit on Sunday. While he was doing this the engineer carelessly started the wheel, and the workman was hurt. He sued the mill company for damages; to which they answered that he himself was to blame; he had no business to be cleaning out the wheel-pit on Sunday; such work could be done on a week-day. And the judges so decided.\*—At Scituate, in the same State, there is a beach where, years ago, the tide would wash up a kind of seaweed which was valuable to farmers for manuring lands. As the ebbing tide would wash it away again, some of them went on Sunday to gather it, and were prevented. The judge said the case was a knotty one; if a vessel were wrecked upon the beach, to work in saving the cargo would be lawful; but the fact that the fish in the bay were unusually abundant on Sunday would not justify casting the nets. How it would be if a whale were stranded was, he said, a puzzle. On the whole, he thought the farmers were not justified in gathering the kelp. Gathering it is not like saving wrecked property, but like ordinary agricultural labor.†

There is an indefinite variety of these instances, and there are many diverse decisions. But no one need object to the general rule of the Sunday laws against business and labor who admits

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\* *McGrath v. Merwin*, 112 *Mass.* 467.

† *Commonwealth v. Sampson*, 97 *Mass.* 407.

the general feeling in the community that a weekly rest-day is needed and useful. Whatever must be done on Sunday to prosecute a business or attain objects which the community at large need more than the rest-day is necessary work, and allowable under the administration of the law as it is conducted throughout the country. The person who is asked to labor in opening the church for worship, in selling medicines, in cooking meals, in preparing Monday morning's paper, in selling dry-goods and groceries, in serving drinks over a bar, may form a good judgment whether the work proposed is lawful by determining whether the ultimate object of the task is more valuable, or less, to the community than the regularity and quiet of the day of rest.

Servants and employés may in general anticipate that the law will sustain them in refusing, upon reasonable conscientious objections, to do secular work on Sunday, such as is not involved in the very nature of their engagement, and is not demanded by some of these higher needs of society. An incident which attracted some attention in the journals, of a vocalist who declined the request of her manager that she should sing in a Sunday concert would probably have been decided in her favor had it been carried to the courts for a decision. The law will not compel, except under special circumstances, the performance of secular labor on Sunday, nor sanction the performance of public work. It has been held that a sailor cannot refuse to do Sunday work; but this was upon the ground of the special necessities of work on board ship. The court said that sailors are entitled to take rest on Sunday, yet not more than they are to enjoy sleep at night; and the master must be allowed to call all hands when the safety or working of the ship requires, whether at night or on Sunday. The courts on shore cannot decide whether he had good reason to do so.\*

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\* *The Richard Matt*, 1 *Biss.* 440; *Johnson v. The Cyane*, 1 *Sawyer*, 150.



## BUSINESS.

There is but little to be said about carrying on business, keeping shops open, making contracts and the like, on Sunday, for two reasons: one is that many of the Sunday laws specify particular vocations; and, as these laws differ in the different States, no generalized statement can be made; the other is that no great public interest has arisen, in recent years, as to this branch of the subject. Some limited, necessary trade is allowed; some more is tolerated; and, beyond these, dealers are generally willing to take one day in seven for rest from any public dealings which would be offensive to the community.

The general principle, however, is much the same as has been explained with reference to work. Trade is restricted or forbidden because it disturbs the people at large in their rest.

By way of proof and illustration, note what occurred in California. In 1858 the legislature passed a Sunday law; and, within a very few days, a Jew who opened his clothing-store on Sunday was arrested. He complained to the court. The judges all agreed that the legislature could not pass a law to compel religious observance of Sunday; and as two of them thought this law of 1858 had that effect, they said it was void, and set the clothes-dealer free.\* Then there was practically no Sunday law for a while. In 1861 the legislature passed another law. A second shopkeeper was arrested, and made the same complaint to the court. The judges agreed again that the legislature could not prescribe religious observances, but they said that the new law did not profess to do so, but only sought to protect the quiet of the day from disturbance; therefore it was valid, and the shopkeeper must pay his fine.† And this was not because California, even twenty years ago, was especially lax. No longer ago than 1877 a Seventh-day believer, prosecuted, in Massachu-

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\* *Exp. Newman*, 9 Cal. 502.

† *Exp. Andrews*, 18 Cal. 878.

setts, for keeping open shop on the Lord's day, argued that he had faithfully and conscientiously kept Saturday as a Sabbath, and ought to be allowed to trade on Sunday. The judges told him he was mistaken in supposing the law intended to make people observe a day religiously.\* It is a civil regulation providing for a fixed period of rest in the business, the ordinary vocations, and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and provide for its welfare. The law imposes on no one any religious ceremony or attendance, and any one who deems another day more suitable for rest or worship may observe it so; but he may also be compelled to abstain from business on the First day—not on religious grounds, but because he must submit to the rules which govern the business of the community. So he was condemned. And there are numerous similar decisions in other States.

2 Making ordinary secular bargains on Sunday, such as in their nature pertain to business and might be made on week-days, executing bonds and notes and other business papers, is generally contrary to law, not in the sense that a person can be punished for it, but that the courts will not enforce the agreement if either party afterwards objects that it was made on Sunday. The principle is not that the particular transaction created disturbance, but that the nature of such business negotiations might have that result. In one instance two men sat in the parlor of one of them, chaffering over a bargain. No one was in hearing but the wife of the householder; she was in the room reading. At last they came to an agreement, and one of them signed a

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\* *Commonwealth v. Has*, 122 *Mass.* 40.

note for the price. When it fell due, he refused to pay it, because it was made on Sunday. The other brought a suit, and called the wife as a witness; who testified that the talking did not in the least disturb her. The lawyer then argued that as no person was disturbed, there was no Sabbath-breaking. But the judges said that discussing bargains and making notes was, in general, an interference with the repose of the Lord's day; therefore the law (in that State) would not enforce such dealings.\*

It is noteworthy that the courts are, in their own practice, faithful to their theory of Sunday. Such a thing as a court of justice requiring any observance of Sunday in obedience to any rule or decision or opinion of a judge is wholly unknown. Such a thing as tolerating any infraction of the repose of the day by any legal proceeding except of the most necessary character is equally unknown. Sunday is, in the parlance of courts, *dies non juridicus*, not a judicial day. Heinous offenders may be arrested. The few things which may be done by a judge or court on Sunday—such as allowing jurors who have sat up all Saturday night to render a verdict and go home, or a prisoner in jail to give a bail-bond and be discharged—are allowed to enable people to observe the day, not to induce them to disregard it.

#### AMUSEMENTS.

The Sunday laws aim to secure a day of general rest from ordinary labor; but no one is obliged to devote it to religion. Hence the question remains, If one may not work, and does not wish religious occupations, what may he do under the Sunday laws? What recreations are allowable? Amusement is not in itself contrary to the spirit of modern Sunday laws. People may amuse themselves, if they are quiet and peaceable. A man in Missouri went hunting one Sunday, and was prosecuted. The district attorney argued that it was work. But the judges said,

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\* *Varney v. French*, 19 N. H. 233.



Not so. There was no law to sustain the prosecution but a law against working; now hunting for pleasure (they said) is not "working."\* But it makes a difference whether what one is doing is for his own pleasure or for wages and to amuse other people.—In Buffalo the proprietors of a public garden engaged an aeronaut and staff for an ascension on Sunday. When they sued for their pay, the proprietors defended because it was a contract for unnecessary work, and the court sustained the defence.†—Many of the amusements for the masses, the shows, plays, and sports which persons provide for profit, are practically found to be adverse to the usefulness of the rest-day, and are prohibited by special laws. These vary in different regions of the country. There is a law in New York State, passed in 1879, which forbids shooting, hunting, trapping, or caging birds or wild beasts. There is another, an older law, which forbids dramatic entertainments. It does not follow that these things are unlawful in New Jersey or Connecticut. In England an act forbids opening "places for public amusement." A few years ago, a company opened an aquarium, with a reading-room in connection, and a band of music. They were prosecuted. The judges said they were sorry to decide against such an establishment, but they must; it was clearly a place of amusement. The managers then discontinued the band and closed the reading-room. But they were prosecuted again; and the judges said the changes made no difference.‡

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\* *State v. Carpenter*, 62 *Mo.* 594.

† *Brunnett v. Clark*, 1 *Buff. Supr. Ct.* 500. The same decision was made in Missouri, where proprietors of a beer-garden refused to pay their musicians on the ground that the hiring was for Sunday. *Bernard v. Lüppling*, 32 *Mo.* 341.

‡ *Terry v. Brighton Aquarium Co.* *L. R.* 10 *Q. B.* 306; *Warner v. Brighton Aquarium Co.* *L. R.* 10 *Exch.* 291.

## TRAVEL.

More travel is tolerated upon Sunday than the law permits. Two grave difficulties embarrass any enforcement of State Sunday laws against conveyances and travellers: one is the right of way of the United States mail; the other is the impracticability of distinguishing the passengers. The State courts have considered that the responsibility is upon Congress of deciding whether or not a mail shall be carried to and fro; and that if a railroad-train, for instance, is carrying mail-bags in performance of a contract with the Post-office Department to transport a mail on Sunday, the engineer and conductor can neither be stopped on their way, nor punished afterwards, because the law of the State may prohibit travelling. Moreover, there are some motives for travel which almost any Sunday law recognizes as justifying it: one may lawfully use a public conveyance for going to church, or to attend the sick, or to seek a doctor.

About eight or ten years ago there were two cases in Boston, in which passengers in Sunday street-cars were hurt and sued the companies for damages, and the companies' counsel argued that the passengers were travelling on Sunday, which was against the law, and therefore could not claim damages. One of these passengers was a man who rode to Charlestown to collect some money due him; the other one was a lady on the way to attend a camp-meeting. The court said it might be lawful for the company to run cars on Sunday to carry persons to church, or upon errands of necessity and mercy; that the creditor was clearly travelling on ordinary secular business, and violating the law, and, therefore, could not claim damages; but that the lady was rightfully travelling, and the company must pay her, the same as if the accident had happened on a week-day. The tendency of public opinion has turned towards some allowance of facilities for Sunday travel. The result has been a general toleration of much travel which probably comes within the pro-

hibitions in the statute-book. — The First Baptist Church in Schenectady had a somewhat unsatisfactory experience of the law's uncertainty. Two railroad companies had a depot together near the church, and the work done in the yards on Sunday by running locomotives about, blowing whistles, etc., disturbed the church service so much that the church brought two suits against the companies for nuisance depreciating their property. But the suits were in two different courts, and while one court decided in favor of the church, the other decided in favor of the railroad.\*—Speaking in general, it is so likely that a train or steamboat carries a mail, and so difficult to ascertain whether each passenger is upon secular or Sunday errands, that the conveyances run without so much interference from the courts as, theoretically, there might be. Questions of running railroad-trains and steamboats are practically decided by the directors in view of the requirements of the mail service and the demands of the public wishing to travel; horse-cars and omnibuses in cities are allowed in the discretion of the city authorities; and rural stages are, for the most part, willing to rest, and not much tempted to run.

Excursion conveyances, however, do not carry mails or passengers who could confuse the question by pleading an errand of necessity or mercy. And recent experiments have shown that if the law of the State prohibits Sunday travel, it can be enforced against an excursion boat if energetic effort is made. The most curious aspect of this topic is presented where excursionists have been upset, or run off the track, or blown up, and their suits for damages have been met with the objection that they were travelling on Sunday. For example, a man is driving along a highway, and suddenly comes upon a hole in the road; his horse stumbles and breaks his leg, and the driver is thrown out and

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\* First Baptist Church *v.* Schenectady and Troy R. R. Co. 5 *Barb.* 79; First Baptist Church *v.* Utica and Schenectady R. R. Co. 6 *Barb.* 313.



hurt. He sues the highway officers for leaving the road in that condition, but their lawyer cross-examines him as to where he was going, and for what object, and elicits that it was only a pleasure-drive. The judge then tells the jury that the town is not under legal obligation to keep highways in order for pleasure-driving on Sunday, for it is against the law. Verdict for defendants. Many cases of this kind have been known, years ago, especially in New England. The rule has been thought, in several of the Middle and Western States, to be too strict; but quite a series of decisions sustains it for Massachusetts. But, in later years, when railroad corporations and steamboat companies have urged the same doctrine, they have not succeeded so well. The courts have held, in effect, that railroads and steamboats need not run on Sunday, unless they wish, to accommodate excursionists; but if they do, they must take the same care and bear the same responsibility as on other days.

In Massachusetts, Mrs. Feital, one Sunday, went from Charlestown to Malden, to attend a camp-meeting. On the way home the car ran off the track, and the lady was thrown down and badly hurt. It was a Spiritualist meeting, and some objection was made that the exercises were not such as could be called "religious." There was "public speaking from the grand-stand," and singing and playing by "trance mediums;" also "physical manifestations" by Miss Laura Ellis, such as that she was shut into a cabinet with her hands tied, and when the doors were opened she was found loosed, and a ring which had been on her finger was on the end of her nose! But Mrs. Feital testified that she believed in Spiritualism as a religion, and attended the meeting only as a devotional service; and the Supreme Court said, on this point, that they could not adjudge, as a rule of law, that she was wrongfully travelling. The jury were the persons to decide whether the meeting was religious, and the lady attended it from religious motives. If so, there was no need to consider whether the train was an excursion train, or whether the generality of the

company were on pleasure travel. If Mrs. Feital was lawfully travelling, the company had the right to carry her, no matter whether other passengers were breaking the Sabbath laws or not; and they were bound to carry her safely, and were liable if she was hurt through their neglect.\*

Many readers will remember the bursting of the boiler of the *Westfield* while lying in her slip at the Battery in New York on Sunday, July 30, 1871. She was a ferry-boat making regular trips to Staten Island in connection with the Staten Island Railroad, and was filled with Sunday excursionists, a number of whom were killed or injured. Several actions were brought, in which the lawyers of the company urged the Sunday law. Both of the New York courts, which had these cases, decided against the defence. They pronounced it a "startling proposition" to say that the thousands of persons who travel on Sunday upon railroads and steamboats are at the mercy of incompetent or careless engineers and servants, with no remedy for loss of life or limb resulting from their negligence. Such a rule (they said) would not practically prevent or discourage Sunday travel, for excursionists do not consider in advance about the carriers being liable for injuries. The high reasons of public policy why railroads and steamboats should be made to carry passengers safely are as important, and neglect of duty by carriers is as wrongful, on Sunday as on any other day. One who travels on Sunday is liable to whatever punishment the statute imposes for travelling; and his contract may be void; but these are all the consequences. He is as much entitled to protection in life and limb then as on a week-day.†—There was a parallel instance in Wisconsin very

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\* *Feital v. Middlesex R. R. Co.* 109 *Mass.* 398. If the jury in such a case should be of opinion that going to camp-meeting is not religious but pleasure travel, the result would be (in Massachusetts) that the traveller could not recover damages. *Lyons v. Desotelle*, 5 *Reporter*, 723.

† *Carroll v. Staten Island R. R. Co.* 58 *N. Y.* 126, and 65 *Barb.* 32; *Landers v. Staten Island R. R. Co.* 13 *Abb. Pr. N. S.* 338.

recently. Not far from the city of Madison is a small place, Watertown; and here there was to be, one Sunday, the laying of the corner-stone of a Roman Catholic church. A party of some eighty persons was formed in Madison to attend. They engaged the Chicago, Milwaukee, and St. Paul Railroad Company to run an excursion train for them, to carry them out in the forenoon and bring them back at evening. The company carried them out as agreed; but when evening arrived, no return train came. The excursionists were left in Watertown all night. It was chilly autumn weather. They were quite unprepared, and many suffered severely. One brought an action, and the jury rendered a verdict of \$300. On an appeal, the company's lawyers argued that the party incurred their troubles because they were travelling on the Sabbath, which was contrary to law, and therefore the courts should not give them damages. But the Supreme Court said that the company were not bound to carry those people on the Sabbath; they might have refused; but the day gave no excuse for leaving the passengers to camp out all night. The company were liable for fair damages. Yet not for \$300; that was too much.\* These decisions justify believing that it is the general rule throughout the country (with perhaps an exception in Massachusetts as to persons distinctly proved to be journeying unlawfully) that proprietors of public conveyances cannot shelter themselves from lawsuits for any carelessness, under the plea that Sunday travel is unlawful.

Street-cars in cities appear to have gradually acquired support from public opinion, which has led the courts to acquiesce in their running. Twenty years ago, a Sabbath committee in Philadelphia took proceedings to suppress the street-railroads on Sunday. They applied to the Mayor, and he directed the arrest of the drivers. A test case was made and carried to the Supreme Court. The complaint was that the noise and disturb-

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\* *Walsh v. Chicago, Milwaukee, and St. Paul R. R. Co.* 42 Wis. 23.



ance incident to running the cars, with that made by some of the more disorderly travellers, was an interruption of public worship in churches along the line, and so was a breach of the peace. The court held that the complaint was well founded. It seems there had been an earlier decision that driving omnibuses for public travel on Sunday was contrary to the law of Pennsylvania, and the court said the same doctrine must be applied to running street-cars. And if, being unlawful, it was done in a noisy manner, or caused disturbance of persons gathered in churches, or desiring special rest and quiet at home, it was a breach of the peace. The judge likened the case to that of a newsboy who should make a noise through the streets in crying Sunday papers. Selling papers quietly would not be a breach of the peace, but shouting about them would be. The car-drivers' counsel offered to show that the companies did not begin to run the cars till after morning service, and that they gave orders to drive slowly in passing churches; but the judge said those facts would not make any difference.\* But quite lately, in a case occurring in Augusta, Ga., the court said that, in view of the dependence of the people for travel upon street-cars, in going to church, visiting the sick, etc., running them might be deemed a work of necessity.†

#### NEWSPAPERS.

These present the question in two aspects: Is it lawful to publish a paper on Sunday morning? and Is it lawful to work on Sunday to publish a paper on Monday morning?

According to one view, rest for readers rather than for the staff of the establishment is the prominent object. In this view, daily journals throughout the week are a need of civilization; and whatever of labor is absolutely necessary on the Sabbath

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\* *Commonwealth v. Jeandell*, 2 *Grant Pa. Cas.* 506.

† *Augusta, &c., R. R. Co. v. Renz*, 55 *Ga.* 126.

for the production of Monday's paper may be justified as work of necessity. But the Sabbath day, for the sake of the general public, should be free from daily papers. Their publication and sale secularize the day, continue the excitements and anxieties of the week throughout its hours, and interfere with its associations and privileges. For their readers' sakes, it is urged that the daily papers should be omitted on the Sabbath. Answer to this is made that the civil law has long disavowed imputing any religious obligation, or enforcing or dictating the faith or worship of the people, and professes to protect the First day simply as a popular rest-day; to keep it free *from* excitements, anxieties, and burdensome week-day toil, and free *for* repose, study, worship, innocent and quiet recreation; in a word, for whatever means of recuperation the orderly, law-abiding citizen finds preferable. Reading is not the least valuable of these means; and the law should not confine the reader to books he can buy and own, nor command him to gather news like manna, a double portion on Saturday. Wherever and as fast as Sunday reading becomes one of the general wants and needs of the people, the law must recognize whatever minimum of labor of librarians or printers may be involved in supplying it as "necessary" work. Since the jurist permits the labor of cooks, of sextons, of druggists, of policemen, of seamen, on Sunday, he must also, in a reading community, permit the small measure of service needed for supplying facilities for reading.

According to another view, the object in suspending a daily paper one day in the week is to afford a day of rest to employés. Answer to this is made that the labor involved in the publication of a morning journal is almost wholly performed before the day commences; that the Sunday issue is the fruit of Saturday's toil, not of Sunday's; and that, if the object of intermitting publication is to give the workers their day of rest, Monday's paper, not Sunday's, is the one to omit. And this is, indeed, what is done in respect to secular holidays. The paper omitted

to enable the *attachés* of the establishment to celebrate Fourth of July or Thanksgiving is usually the next day's paper.

The questions whether a Sunday-morning paper is demanded in a community, and what may wisely and rightly be the character of its contents, do not belong to the courts, but to the people. The theory of Sunday laws would be that the judges should take the general judgment and experience of the community as to whether the publication of a morning paper on either day is one of those general needs which are equal to the need of a rest-day. If it is, then the work necessary to be done on Sunday to publish either is lawful. But the community is not agreed on this question. What shall the courts do under that state of facts? Publishers of newspapers are not agreed. The practice in different parts of our country varies notably. Throughout the Eastern cities the suspension of a daily paper on Sunday is the very general rule. In New York a majority of the dailies appear on Sunday as on other days, very little, if at all, changed in tone of contents, and exhibiting, perhaps, an increase in advertising; and this is done without a suspension on Monday. In several of the Western cities it has been usual to publish the paper (prepared on Saturday) on Sabbath morning, as usual, to give Sunday to rest, and, accordingly, to omit the paper on Monday. And religious people are not agreed. The general practice in the larger cities of advertising church services in Sunday-morning papers is adapted to make a judge suppose that a considerable percentage of active managers of churches both think it right that papers should be published and believe that a proportion of church-going people do read the aforesaid papers before church-time. And the number of persons who refrain from buying a Monday's paper because it was probably produced by Sunday work is trivially small. The courts have been perplexed, like the community. But there is good ground for saying that the law will sustain a paper in publishing on either day, or omitting either day.



In New York, Sunday newspapers are permitted by an express statute. There was a decision, about twenty years ago, which has contributed towards an impression that the publication of a paper on Sunday morning is really contrary to the law, and is done only by toleration. But the legislature interposed to annul that decision, and seems to have expressed the sense of the people to be that it is necessary work, and that no legal objection can be taken to the contracts or dealings of a newspaper on the ground of publication on a Sunday.\* The case was that the publishers of the *Sunday Courier* sued a firm which had ordered six months' advertising in their paper for the bill. The merchants defended solely on the ground that the contract to publish an advertisement in a paper issued on Sunday is contrary to law. The courts sustained the defence. They declared that the State statute prohibiting unnecessary labor, or exposing merchandise for sale, on Sunday was fully applicable to the publication of newspapers. No matter when the writing, type-setting, and press-work were done, the opening of a place of business for the publication and sale, on Sunday, of the printed sheets, the giving them out to the public on that day, was against the statute. It was one of the very mischiefs which the statute meant to prevent. Even if a prohibition upon unnecessary labor is not violated, one against exposing merchandise for sale is broken. Newspapers, so far as they are the subject of ordinary sale, first at wholesale, then at retail, are merchandise, and traffic in them is subject to such a prohibition as fully as is trading in other goods.†

But in a more recent Missouri case an opposite decision was reached. During the period while the *Home Journal*, in St. Louis, published a Sunday edition, one of the business houses in that city ordered an advertisement in it, every Sunday, for a

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\* N. Y. Laws of 1871, ch. 702, § 1.

† *Smith v. Wilcox*, 24 N. Y. 353, and 19 Barb. 581; 25 id. 341.

year. Later, the proprietors discontinued their Sunday edition, and transferred the advertisement to their Saturday paper. Still later, the advertisers became dissatisfied, ordered the advertisement stopped, and paid in full up to that date. The newspaper proprietors, however, continued to publish it until the end of the year, and then sued for the balance of the bill. The lawyers for the advertisers at first set up the New York case above related, and argued that the whole contract was void, because it was expressly for publishing on Sunday. But the Missouri court said, "Not so. This contract does not require the publishers to do any work or business on Sunday. It can be performed by printing and mailing the paper, or furnishing it to dealers on Saturday night. Placing the papers, overnight, where subscribers can get them on Sunday does not violate the law; and if it does not, then the contract is not void." With that agility which characterizes the legal profession and so often astonishes the general public, the lawyers for the advertisers then set forth the defence that the publishers had broken the contract, because they had published in a Saturday paper instead of a Sunday one. The advertisers had agreed to pay, so their lawyers urged, for publication in a Sunday paper, but were put off with insertion in a Saturday journal. And the Missouri courts decided that this was a good defence.\* Thus the New York paper lost its case because it did publish on a Sunday, and the Missouri paper because it did not.

A San Francisco case presents the question in a different aspect. In that city the view seems to have prevailed that Monday is the proper day to intermit a daily paper; at any rate, the San Francisco *Chronicle* was published every Sunday morning, and omitted on Mondays. Meantime the city assessment laws required that whenever the city authorities wished to give out work upon a street improvement, they should publish a notice in

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\* *Sheffield v. Balmer*, 52 Mo. 474, and 1 Mo. App. 176.

two "daily papers." The supervisors decided upon giving out some work, and published the notice in the *Chronicle* for one paper. But some citizen who was assessed for a share of the expenses objected. "For," said he, "the law requires two daily papers. Now, a daily paper means a paper published every day. Then the *Chronicle* is not a daily paper, for it does not appear on Mondays." But the courts held that a paper which, by its usual custom, is published every day but one is a daily paper.\* The proprietors have the right, in law, to observe one day for rest. They can omit either Sunday's or Monday's publication, as they please, without forfeiting any privilege their journal may have to be deemed a daily.

There is little doubt that similar support would be given to the quiet opening of public libraries wherever judicious directors are convinced that it is demanded by the best welfare of the community. This ground was very nearly reached by a decision in Philadelphia, years ago, where the complaint was that the Mercantile Library was *not* kept open; and the court explained that this was something which the law neither commands nor forbids.† The question is confided to the sound judgment of the conservators of the institution, who are trusted to do as the public interest requires.

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\* *Richardson v. Tobin*, 45 *Cal.* 30.

† *Matter of Granger*, 7 *Phil. (Pa.)* 350.



## CHAPTER XXVI. CORPORATIONS.

EVERY one has a general idea of what is meant by a "corporation." For various purposes of public importance, governments have been accustomed to create artificial or fictitious persons. Such an "artificial" person may consist of a single individual; but more frequently, in modern law, a number of natural persons are united as members in one corporate body. The theory is that the corporation is a distinct legal entity, a different person in law, from either or all of the men and women composing it. Some important results are that (if the pure original theory of incorporation is applied) the individual members are not responsible for the acts done or authorized by the aggregation; they are not liable for its debts; and the death or resignation of some of them makes no difference in the existence of the artificial body.

### BLACKSTONE'S ACCOUNT.

Corporations were known and in use in English and American law long before our Independence. Therefore no extended explanation of their nature and management is needed here. The advance and growth of this branch of the law is the chief topic. A century ago they were limited in number and confined within a small field. Blackstone could give a satisfactory account of them in less than twenty of his small pages, while at the present day a score of volumes would scarcely suffice. The chief uses of corporations in his time were to hold and administer permanent endowments of religious, educational, and charitable institutions, and to receive and exercise powers of local government. They

are still used in greater numbers than ever for these functions. Thus, a church, a hospital, a college, a city, is commonly incorporated, so that its affairs may be as little as possible dependent on the precarious lives or variable wishes of its members. But the advance of civilization has introduced a great variety of enterprises and vocations which can be better carried on by these permanent organizations than by individuals; and an immense number of chartered bodies, such as were unknown or scarcely mentioned a century ago, are now in active operation throughout the land. Some very important branches of business are wholly engrossed by them, such as railroads and telegraphs. They have nearly superseded individual enterprise in banking, insurance, and express transportation. The most important and extended manufacturing establishments in many parts of the country are chartered. And in many other branches they are active and prosperous competitors with private persons and firms.

#### THE "BUBBLE COMPANIES."

The operation of the principle that individuals might unite in a corporation, each contributing a certain sum to be expended in the enterprise, while the members incurred no risk of debt or loss beyond that sum, very early gave rise to fraudulent and injudicious projects. About a century and a half ago, there occurred a period of frantic, reckless speculation, during which John Law's chimerical schemes and the South-Sea Bubble were the most prominent hallucinations; but a great number of fanciful, illusory corporate projects were advertised. It seems amazing that such proposals as were published could have won the slightest credence; but there were so many, and they had such success in deceiving the people, that government was forced to interpose to abolish or prohibit them. Companies were formed, prospectuses issued, and subscriptions solicited for the most absurd schemes, such as for building and rebuilding houses throughout all England; for effectually settling the islands of

Blanco and Sal Tortugas; for improving the art of making soap; for a settlement on the island of Santa Cruz; for a wheel for perpetual motion, capital one million; for insuring and increasing children's fortunes; for carrying on a trade in the River Orinoco; for insuring to all masters and mistresses the losses they may sustain by servants; for extracting silver from lead; for the transmutation of quicksilver into a malleable fine metal. One party of speculators issued proposals for carrying on "an undertaking of great advantage, nobody to know what it is." In England this tendency of the law of corporations to give opportunity to speculators for visionary and even dishonest enterprises not only led to several statutory penalties and prohibitions, but also encouraged the policy of restricting the granting of charters for business enterprises. In that country these are sometimes given in the full sense of implying that the members of the body shall not be personally liable for its debts; but it is more common to withhold a full charter and the name "corporation," and to give the body of persons some other name, usually "public company," sometimes "joint-stock association," authorizing them to carry forward their enterprises under "limited liability."

#### INDIVIDUAL LIABILITY.

The same general object has been attained in the United States by a somewhat different method. It has been common to use the name "corporation" freely for the various bodies chartered by the legislatures or organized under general acts, but to impose an individual liability on the members by a specific enactment. Thus, though they are called a corporation, the full common-law exemption of the individual members from the corporate debts is not given. If the enterprise fails and losses are incurred, the members must respond out of their own property to the demands of creditors within the limit fixed by the law, notwithstanding they are incorporated. The difference is more in *words than in substance*. Practically it does not make much



difference whether a club of persons operating a factory is called a "public company (limited)," to signify that the members are only partially liable for debts, or is called a "corporation," but members are subjected to a partial liability specially imposed.

Besides the individual liability of members, there is an important and comprehensive series of decisions holding that the promoters and officers of these companies or corporations who personally take part in publishing any false prospectuses, advertisements, or circulars, inviting the public to subscribe to the establishment, or deal with it upon exaggerated statements of its resources, are liable in damages to persons who are defrauded. A director is not at liberty to say that he did not know the advertisement which he joined in issuing was false. He is bound to know the general condition of the affairs of the company in which he is a director.

#### LIABILITIES OF DIRECTORS.

Many precautions and regulations have been introduced in the modern law of corporations for holding directors to a strict responsibility for a faithful performance of their duties. Not only are they required to know the condition of the company's affairs, and chargeable with damages for publishing any untrue statements, but, with regard to many classes of business corporations, they are directed by law to file in the public office and publish in the newspapers, annually (or oftener), correct statements of the business done and the present condition of the enterprise; and for neglect to do this a personal liability for the debts of the company is a very common penalty. There needs no extended explanation of the principle that for any wilful wrong and intended fraud, any embezzlement or peculation, directors are liable to parties injured, and, in many cases, personally punishable. There are numerous statutes embodying this principle, and many trials and decisions have enforced it and exemplified its application.

A topic of greater doubt and deeper interest is, How far will

the law enforce judicious management upon directors, and hold them responsible where there is no charge of fraud, no suggestion of intentional mismanagement, but the complaint is of mere easy-going carelessness? Suppose that, in a bank or insurance company, well-meaning directors hold meetings now and then; some attend, and others do not; a report or two is heard, an order or two made; all details are left to subordinates; and so business proceeds until, some day, there is a defalcation or a robbery, from mere failure to prescribe and enforce strict rules. Have the losers any remedy against directors for feebleness in executive management?

Years ago the rule on this subject seems to have been rather favorable to directors. When Kane, the secretary of the National Insurance Company, embezzled nearly two hundred thousand dollars, the directors were sued to make good the loss, upon charges that several of them knew he was a gambler and a bad character; that they did not exact any bonds from him, nor exercise any supervision over his accounts, and that this neglect enabled him to make away with the money. But the directors disproved any knowledge of his bad character, and showed that it was not usual to take bonds from an insurance secretary. And the court held that they had a right to elect a secretary, and trust the business to him, according to the usual course of the companies; they were not bound to attend every day and inspect his books.\*—In a Pennsylvania case, more recent, the charges came home even closer to the directors in person, yet they escaped adverse judgment. They were sued for squandering the property of a trust company; and the proof showed that their management had been very unwise; the money had been invested in unsafe securities, and loaned on doubtful collaterals; there were losses from injudicious investments in land, and from burning of buildings which the directors had failed to insure;

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\* *Scott v. Depeyster*, 1 *Edw.* 513.

and when a crash came, they added ruin to folly by reckless sacrifice of assets in a vain attempt to avoid an assignment. But they had not made any personal profit out of their dealings, and had always attended to business and taken counsel of the company's lawyer. The court held they were not personally liable for mismanagement, for mistakes of judgment, or for want of skill and knowledge.\*

The course of decisions in the courts of late years has been steadily drawing the lines more distinctly, and enforcing the duty of prudent, skilful care on the part of directors more stringently.

A society of Shakers, about ten years ago, made a special deposit of bonds with the Bank of Bowling Green in Kentucky. The bank became embarrassed, and some of the subordinate officers sold these deposited bonds to raise funds to tide them over their trouble. The Shakers, on discovering the loss, sued some of the directors, and the court held the action was maintainable. They were bound to know how the subordinate officers were managing the bank's affairs, and what misuse they were making of the deposit.†—Two cases of sheer robbery have found their way into the courts—one in Pennsylvania and one in South Carolina.‡ The complaining parties were borrowers who obtained loans from the banks and deposited collateral securities. Robbers broke in and carried away the securities; and the losers, finding that the banks were poor, but the directors rich, sued the latter individually, on the ground of their carelessness and neglect in taking proper precautions for the security of the banking-house. The decision was that directors are personally liable

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\* *Spring's Appeal*, 71 *Pa. St.* 11.

† *United Society of Shakers v. Underwood*, 9 *Bush.* 609.

‡ *Erie Bank v. Smith*, cited in 2 *S. C.* 527 from *Legal Gazette*, Jan. 20, 1871; *Scott v. Crews*, 2 *S. C.* 522. Compare also cases where the bank, not the directors, was sued: such as 4 *Brews*, 234; 62 *Pa. St.* 47; 72 *Id.* 471; 81 *Id.* 95; 58 *Me.* 273.



if they do not exercise ordinary care to preserve a depositor's securities, except, perhaps, where the box or parcel is taken in as a mere favor to its owner. They must use the diligence and precautions which a prudent business man would usually take in keeping his own securities. Their duty is to be judged according to the circumstances of time and place; more care is due in a crowded city than in a quiet country village; a higher responsibility attaches now than was enforced a generation ago. They are not bound to try every new bank lock, or adopt the latest form of safe. But they are bound to care for the property in their charge as prudent men of the time and place care for their own, and are liable for a loss attributable to their failure.—There was, however, a Vermont case of this general nature which was decided against the depositor on a ground which would not occur to an average business man when making financial arrangements. Mr. Wiley carried his United States fifty-two bonds to the bank in his town, and arranged with the cashier to leave them with the bank for safe-keeping, as a "special deposit." The cashier accepted them, and gave Wiley a receipt. When the latter, some months afterwards, called for them again, lo! they had been stolen; and, as the bank would not make the loss good, Wiley brought suit against it. The bank directors then set up the defence that theirs was a national bank; that taking special deposits was not a part of the business of national banks as declared by the acts of Congress; and that therefore the cashier had not any power to bind the bank by an agreement or receipt for a special deposit. He could only bind himself; and Wiley's suit should be against the cashier as an individual. The court sustained this defence.\* It is not certain, however, that this rule is applicable to all cases. Much might depend on the particular circumstances. If the bank had received payment for keeping the bonds, or if the directors had

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\* *Wiley v. First National Bank of Brattleboro*, 47 Vt. 546.

known that the cashier was accustomed to accept special deposits and had not objected, perhaps the courts would not allow the corporation to deny its liability.

#### CITIZENSHIP OF CORPORATIONS.

Corporations are not mentioned in the national Constitution; probably because, at the time when it was framed, they were few and feeble, and no one anticipated that they would attain such influence or wield such power as they have acquired. Very important constitutional and political questions have arisen regarding them, which the courts have been obliged to discuss and decide upon what have seemed to be reasonable implications from clauses which seem to have been written without any thought of corporations. One of these questions was upon the power of Congress to charter a bank; and the Supreme Court decided that, although no such power is given in terms, Congress could exercise it if necessary and proper as a means of doing anything expressly authorized.\*—A question similarly depending upon remote construction of phrases in the Constitution having no apparent reference to corporations arose in what has been widely known as the Dartmouth College case.† In colonial times a royal charter was granted incorporating a college to be located at Dartmouth, to be under the charge of twelve trustees forever, who should have power to fill their own vacancies. Early in the present century, the legislature of New Hampshire assumed to change the law of the college in respect to the number and powers of the trustees, declaring that there should be twenty-one; that the extra nine should be appointed by the governor; and that the acts of the trustees should be subject to revision by a board of overseers. The college objected to

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\* See the section "State and National Powers" in chapter i., on Constitutional Government.

† Dartmouth College *v.* Woodward, 4 *Wheat.* 518.

this, and contested the right of the legislature to pass such a law. There is nothing in the Constitution apparently applicable to the question. But there is a clause declaring that no State shall pass any law impairing the obligation of contracts; and the counsel for the college, Mr. Webster especially, argued that a charter offering to individuals the opportunity of becoming a corporation if they will furnish the money and do the work necessary to carry the enterprise into effect is, if accepted and acted upon by them, a contract; and that the legislature cannot afterwards change the terms without the assent of the corporation. The Supreme Court sustained this view. The decision, however, suggested that if government should, before or when granting the charter, reserve a power to alter or amend it at any future time, that power would be valid. Since that time such powers have generally been reserved, either in each charter as granted, or, frequently, by a general law or constitutional provision that all charters granted by the legislature shall be subject to subsequent alteration or repeal. Upon these principles the law is now generally established that the legislature can control corporations of modern creation by means of a reserved power; but there are a few corporations chartered before the date of the Dartmouth College case (1819), and some others which have been created since without reserving such power, which are independent of legislative changes made without their assent.

A still more interesting and important question of this nature has been whether a corporation can be regarded as a citizen. The Constitution arranged that ordinary lawsuits between citizens of the same State should be tried by the courts of the State, but that any lawsuit arising between citizens of different States might be tried in a court of the United States if either party desired.\* Before many years, corporations began to bring

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\* See section "The United States Courts" in chapter ii., Bird's-eye View of American Courts.



suits in the Federal courts, claiming that they were entitled to the benefit of this constitutional provision. But the Supreme Court said that a corporation cannot be considered a citizen; but if the members of a corporation should be citizens of one State, particularly of the State by which it was chartered, while the person to be sued was a citizen of another State, the constitutional provision would apply. Soon, however, cases arose in which the individual members of a corporation were not all citizens of any one State, but lived in different parts of the country, and much perplexity was felt as to the right to sue under such circumstances. The final decision has been to treat a corporation as if all its members were citizens of the State by which it was chartered, making no inquiry whether perhaps some few of them may not dwell elsewhere.\* This has attained the result of enabling corporations to sue or be sued in the national courts without committing the verbal absurdity of calling them citizens—an absurdity which might lead to serious practical inconvenience under that other clause of the Constitution which declares citizens of each State entitled to the privileges and immunities of citizens in every other State. It is quite clear that, as the term "citizen" is at the present day understood,† it does not apply to a corporation. Calling a corporation a citizen suggests such ideas as that it may take an oath of allegiance; that it may be tried and hanged for treason; that it can take out a passport and travel in foreign lands; that it may vote, or, at least, be counted in computing representation in Congress; all of which are incongruous.

#### THE CLAIMS OF THE INSURANCE COMPANIES.

The claim has, however, been earnestly pressed that the corporations chartered by one State are entitled, under the Consti-

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\* *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286.

† See chapter v., "Citizens."

tution, as if they were citizens of that State, to enter, by their agents and branch offices, any of the other States they please, and there transact whatever business is allowed to the corporations or citizens of that State. Insurance companies in particular have urged this view. Early in the development of insurance business, the more active and enterprising companies found it advantageous to establish branches throughout the country. They did so; with the result, in many instances, that, in the event of a failure of the company, its policy-holders in distant States were practically without redress. The States which sustained inconvenience from this cause endeavored to protect their citizens by passing laws to prescribe conditions with which foreign companies must comply before they should issue policies abroad. Such laws required, for example, that a company desiring to establish a branch within the State should deposit money or securities with the State authorities, to secure payment of the policies which it should issue within the State; that it should submit to certain convenient regulations as to being sued in the courts of the State; that it should pay a liberal license fee to aid in supporting the State government. Insurance companies contested the right of the States to impose these conditions.

A notable decision upon this branch of the law is that of *Paul v. Virginia*.\* Mr. Paul was appointed agent of several New York fire-insurance companies to carry on their business in Virginia. He complied with all the provisions of the Virginia law except one quite important one, which was that he should deposit with the State Treasurer bonds to the amount of thirty or fifty thousand dollars for each of his companies, to make sure that any policies issued should be punctually paid. Because he began issuing policies without having obeyed this statute, he was indicted and fined. He appealed to the Supreme Court at Washington. That court decided that the constitu-

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\* 8 Wall. 168.

tional clause about the privileges and immunities of citizens does not apply to corporations. The objects of it were to protect natural persons passing from one State to another against being treated there as aliens; and to secure to them freedom, and the enjoyment of property and rights, and the protection of the laws, wherever they might be. There was no intention to render a charter granted by one State operative in another; if this were allowed, the independence of the States would soon be gravely impaired. If any one State could create corporations clothed with a constitutional right to prosecute their business without restriction in every other State, the result might soon be that the principal business in every State would be controlled by corporations created elsewhere. No State could then limit the number of corporations doing business within her territory, or enforce proper regulations to secure a prudent and honest conduct of their affairs; while the States by which the corporations were respectively chartered would have little or no inducement for doing so. The Virginia law was fully sustained.

The same general question has been discussed in various aspects in a variety of cases, with the general result of vindicating completely the right of the States to restrict foreign corporations as they please. A corporation is not a citizen, but a mere creature of the local law of the State by which it is chartered. It has no right to establish a branch or transact business in another State against her consent. If, indeed, she has not passed any law objecting or imposing conditions, the courts will take it for granted that no objection exists; and, under such circumstances, the acts of a corporation outside its own State will be sustained upon the doctrine of "comity," as it is called. But this is only supposing or assuming that the State which has not objected is willing. It is only an application of the proverb "Silence gives consent." If any State objects, or requires payment of fees, deposit of securities, appointment of agents to accept service of process, or performance of any other conditions



whatever, she can do so, and the foreign corporation must obey, or withdraw its branch.

There has been one remarkable litigation within a few years past illustrating the principle very strikingly. The Legislature of Wisconsin became apprehensive that foreign companies sued within the State would escape justice by the device of removing the suit into a Federal court, under the doctrine upon that subject already explained. They therefore passed a law requiring every such company to subscribe and file at the State capital a written agreement, waiving any right it might have to ask to have any suit brought against it in a State court removed into a Federal one. A company which had filed such an agreement was sued; and, notwithstanding the agreement, applied to have the suit removed. When the written agreement was produced and read, the lawyers for the company argued that to exact any such agreement was unconstitutional, and the agreement itself was not binding; the right to have justice in the national courts could not, they claimed, be taken away by State statutes. The court decided that this was so, that the statute was void, and that the agreement could not be enforced.\* The Secretary of State of the State revoked the license of a like company. By this means, as a punishment for breaking its agreement, it was forbidden to transact any more business within the State. The company complained to the court of this, and argued that it must be unlawful to punish a person for refusing to comply with an unconstitutional and void agreement. But the court said that any State has the right to deny to foreign corporations the privilege of establishing branches within its territory, for any reason, or for no reason at all. A court cannot inquire into her motives. If she is not willing to permit the agents of the company to come, they must stay away, no matter what her objects are. †

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\* *Home Insurance Co. v. Morse*, 20 *Wall*, 445.

† *Doyle v. Continental Insurance Co.*, 94 *U. S.* 535.

## THE PACIFIC RAILROADS AND THE SINKING-FUND.

Another example of the novel and complex constitutional questions of this nature is found in the recent decision relative to the Pacific Railroad. About twenty years ago, the State of California chartered the Central Pacific Railroad, while Congress chartered the Union Pacific; and the two companies united in the enterprise of constructing a road from the Missouri River to the Pacific Ocean. At that time the country was convulsed with war, the Far West was a trackless wilderness, and commerce with California was in its infancy. Government aid was needed, and was liberally accorded. Upon the other hand, the construction of the road was imperatively important to government. The United States loaned about thirty millions of dollars' worth of its bonds to each company, each company issued about thirty millions of its own bonds, and the whole one hundred and twenty million dollars were sold by the companies, they agreeing to pay both classes of bonds at maturity. Since the commencement of their business the companies have been paying out their earnings in dividends, and the government became apprehensive that there might be a default in the payment of the government bonds. Congress, therefore, in May, 1878, for the purpose of rendering the bondholders secure and protecting the Treasury, enacted that the companies should create a sinking-fund sufficient for the payment. The act directed that whatever moneys the roads should earn in carrying mails, army supplies, etc., should be retained in the Treasury and put at interest, instead of being paid over to the companies and divided among the stockholders; also, that the companies, before declaring any dividends from ordinary business, should pay into this fund enough of their receipts to make the amount equal to twenty-five per cent. of their earnings. The companies strongly objected to this arrangement. The leading objections were that the government is bound by the arrangement as originally made; that ex-

acting from the companies annual contributions towards a sinking-fund in the Treasury, years before the debt to be discharged is due, is taking property without due process of law, which the Constitution forbids; and that the doctrine of State rights prohibits Congress from interfering with the fiscal management of a company (the Central Pacific) chartered by the State of California. But the court sustained the law.\* In the opinion of the majority of the judges, the true question in the case was, Whether a statute which requires the company, in the management of its affairs, to set aside a portion of its income as a sinking-fund, to meet the subsidy bonds and other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights? Now the chartering acts reserved a power in Congress to control the business, as might be required for the public interest, by making such alteration or amendments as come within the just scope of legislative power. Congress cannot, indeed, "unmake" the original contract, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. The United States occupy towards the corporation a twofold relation—that of sovereign and that of creditor. In their relation of sovereign, it is their duty to see that the current stockholders do not appropriate to their own use that which in equity belongs to others. A legislative regulation which does no more than require them to submit to their just contribution towards the payment of a bonded debt cannot in any sense be said to deprive them of their property without due process of law. The law in question may be sustained as a reasonable regulation of the affairs of the corporations, and co-promotive of the interests of the public and the corporators, and is also warranted under the reserved authority to change or

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\* Sinking-fund Cases, 99 *U. S.* 700.



modify, by amendment, the rights, privileges, and immunities granted by the charter.

#### TAXING BENEVOLENT CORPORATIONS.

The difficult questions in the law of corporations are not all between corporations and the general government. There are several which involve the relation between incorporated bodies and the State. One of the most perplexing of these is how far the property of charitable and educational institutions and religious societies should be exempted from taxes. In this question three parties are interested: 1. The immediate friends of benevolent operations. Donors of money or lands to found a college or build a church, clergymen, teachers, and Christian workers feel strongly that such objects deserve especial favor and protection from the State, which ought to increase their funds by additional gifts rather than reduce them by taxes. 2. The tax-payers. If indifferent to benevolent enterprises, and engrossed only in secular pursuits for profit, these are likely to feel the burden of their own taxes as too heavy, and to complain if property in the form of schools and churches, which, they say, shares the expensive protection of police and government equally with that of tax-payers at large, does not contribute equally towards the cost of that protection. 3. The tax-officers. These have a certain official enthusiasm in favor of collecting the highest allowable taxes from all persons and property. In colonial and early State history the same considerations which led to making endowments of benevolent enterprises with public funds, more freely than would now be deemed judicious, induced a liberal exemption of property invested in such undertakings. It has become a very general rule that property owned by a public charitable, educational, or religious body will not be taxed by the State for general expenses of government. But the tendency of the times is towards questioning this policy, and limiting the privilege within stricter bounds.

One of the nice questions which have arisen is, What are the institutions which may enjoy this privilege? Assuming that the State has said, in general terms, that it will not tax benevolent, literary, or religious institutions, what establishments does such phraseology embrace? It is a curious example of this class of questions that Masonic lodges have been adjudged, in Georgia and Indiana, to be "charitable" enough to escape taxes; but in Ohio an Odd-fellows' lodge was held not to be. Such differences in decision do not always imply that either court is in error; the reason may lie in some difference in the wording of the laws of the different States. The Hebrew Free School Association in New York city was considered to be "religious," and the Little Sisters of the Poor in Cincinnati "charitable," in such degree that they were allowed to go free of taxes. As to schools, the question is complicated by the very general provision now made throughout the country for common-schools, built and carried on at public cost. The current of thought is that this is enough for the public to do towards education. A school which the teacher conducts for his own profit ought not to be relieved from taxes, even if the law does say that school-houses need not be taxed. Such laws mean public schools, not private enterprises. If, indeed, a school or academy were maintained for public benefit, excluding all profit to the owner of the land and buildings, the decision would probably be different.

A rule of considerable importance is that the privilege only embraces the property which the favored institution uses directly in its benevolent operations. In a number of instances endowments have been invested in lands or buildings for rent, in bonds and mortgages, stocks and the like, and the corporations have asked to be excused from taxes because they employed the income from these investments in benevolent work. Such requests have almost always been refused. Property which earns an income for its owners must pay its tax, irrespective of the use made of the income. So must property which is devoted to out-

side uses. Although a college should have a privilege of owning property free, yet, if it should buy lots, erect buildings, and let them for the income, these would, by most courts, be made to pay tax. This has been done in several instances.

The trustees of Wesleyan Academy in Wilbraham found, some years ago, that the accommodations for boarding students in the families of the village were insufficient, and they established a boarding-house and farm in connection with the academy. The produce of the farm was devoted to supplying the table of the boarding-house, and students who desired were allowed to board at actual cost of provisions and cooking. The trustees made no profit. This, of course, reduced the profits of the villagers from student-boarders, and this appears to have stimulated the tax-collectors to tax the property. The court said this must not be done; as the boarding-house and farm were not rented out, nor carried on at a profit, but the students had the benefit of them at cost, the property was used for the benevolent purposes of the institution.\*—The trustees of the Chapel of the Good Shepherd in Boston were not so fortunate. They erected a lodging-house for respectable poor families. It had a chapel, reading-room, and Sunday-school connected with it, and was, thus far, a mission-building; but the rooms were rented at market prices, and the trustees realized a profit of six per cent. The court said this lodging-house must pay.†—In several instances a church has built a parsonage and allowed the minister to live there rent-free; and, out in Kansas, the Episcopalians bought land and built a house for the residence of the bishop of the diocese; but the courts have said these buildings should be taxed, because they are not directly used for the religious purposes of the society.‡ Like decisions have been made where colleges have built houses

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\* *Wesleyan Academy v. Wilbraham*, 99 *Mass.* 599.

† *Chapel of the Good Shepherd v. Boston*, 120 *Mass.* 212.

‡ *Vail v. Beach*, 10 *Kan.* 214.



on college grounds for occupancy by the professors. In Indiana and Iowa, however, the law is very liberal on these points, and such parsonages and professors' houses are free.

This subject has been very recently reviewed by the Supreme Court of Pennsylvania in its application to the buildings of the Young Men's Christian Associations. The Philadelphia association has a fine building, comprising a ground-floor, which is rented for stores, and upper floors fitted up and used as a library and reading and meeting rooms. As the law of Pennsylvania exempts property of any institution of public charity, the association declined to pay any tax. The collector insisted on payment, and the association appealed to the court. For the tax-collector it was argued that a Christian association is not a "public" charity, because it is not impartially open to all, but membership is confined to "Evangelical" persons. The court decided, as to this question, that "Evangelical," in a legal sense, does not denote any particular denominations of Christians, but includes all Christians: it means "according to the Gospel." An endeavor to disseminate the principles of the Gospel of Jesus Christ impartially among all classes of young men is what the constitution of a Christian association requires; and this is a public charity. All property of an association which is directly used in this benevolent work is exempt from taxes. Not so the rented stores. These are an investment of money for an income, and such property must respond. The tax was therefore reduced to a fair sum for the stores on the ground-floor. The society was told to pay that, and the collector was ordered to let the upper part of the building go free.

## IV.

### LIFE IN CITY AND COUNTRY.

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#### CHAPTER XXVII.

#### DRIVING AND WALKING.

THE leading practical rules in this field of the law are, keep to the right, and do not obstruct the sidewalk. There are, moreover, a number of entertaining stories in the books about scared horses.

#### KEEP TO THE RIGHT.

Throughout this country, the general rule of the road for persons meeting upon a street or highway is that each one shall "keep to the right." It is not so well settled for foot-passengers on sidewalks as for vehicles. In many country places the sidewalks are not defined or continuous, and in others many persons will cling to the old-fashioned idea of complimenting ladies or old persons by giving them the wall. In the cities, the custom of keeping on the right-hand side of the sidewalk should be unvaryingly observed; any one who persists in taking the left hand may be deemed ignorant or rude, unless there are very special reasons for his conduct. For vehicles, the right-hand side is the right side, alike in town and country. Some of the States have statute laws commanding this. In others, the rule rests upon custom. Yet it is not an absolute rule, which every driver is to follow under all circumstances. There is a higher duty, that of using common-sense to avoid injury. If one driver sees that another driver is approaching who will not turn to the right,

he himself may, and should, turn to the left in that particular instance. This might occur through perverseness or through ignorance.—By all accounts, the English custom is the reverse of the American: vehicles pass to the left. The English practice is recommended by one consideration: as drivers sit, by custom, on the right-hand seat in carriages, they have, by keeping to the left, a much better opportunity of watching the wheels which might collide. An Englishman driving in this country, ignorant of the American custom, might persist in keeping to the left, in the belief that he ought to do so. The American driver cannot, in such a case, justify himself in doggedly keeping to the right and running into the other carriage. The rule is given for avoiding collisions, not for producing them. It only means: Keep to the right unless you see special reason for doing differently.—There was a man in Nashua, N. H., who undertook to move his wooden dwelling-house through the streets to another lot. The surveyors of highways interfered, and he appealed to the court. One of the law-points against him was that the house was so large it would fill the street; he could not “keep to the right,” as the law directed. The court said that in that part of the country it was common to move buildings, and a man had the right to do so if he did not occupy the road unreasonably long; and that the statute about keeping to the right had nothing to do with house-moving.\*—The same thing has been said about the horse-cars. A New York street railroad-car met a cart. The cart attempted to turn to the left, and there was a smash. The railroad company complained because the cartman did not turn to the right, but the court said that the rule does not apply to street-cars, but only where both vehicles can turn out. A cart which meets a horse-car may turn to either side on which there is the best chance to pass. †—In Michigan,

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\* *Graves v. Shattuck*, 35 *N. H.* 257.

† *Hegan v. Eighth Ave. R. R. Co.*, 15 *N. Y.* 380.



the proprietor of a steam threshing-machine was travelling in it (it ran by steam-power) along the road, when a horse and wagon approached. The threshing-machine man steered over to the extreme right side, and stopped his engine to avoid frightening the horse. But the horse took fright, and ran away. His owner sued for damages. But the judges said the owner of the machine had the right to travel with it, and had done his whole duty.\*—Other very common cases are where one of the travellers can turn out much more easily than the other. If a man on horseback, or a pedestrian, or a light, easily managed carriage meets a heavily laden, clumsy team or wagon, the duty of turning out is almost wholly on the first named. But there is no inflexible rule for all cases; each traveller must do the wisest and best thing indicated by circumstances to avoid mischief.

There is a law of Congress which makes it an offence for any person to stop or hinder a vehicle carrying the mail; and the usefulness of having the mail-wagons which run to and fro through the New York city streets so gorgeously painted and gilded as they are, is that it prevents cartmen from getting in the way and then saying they did not know it was a mail-wagon. No one can mistake the big red-and-yellow affair, having the shape of a hearse, the size of an ark, and the colors of a circus chariot, which flashes along the streets of the metropolis, for anything but a United States mail-cart. The courts have said that these must not be stopped; but they have no other privilege: they must obey the law of the road, as other vehicles. In Pennsylvania, years ago, a man in a wagon was jogging along, when a stage carrying mail-bags came up behind and wanted to pass. He turned out as far to one side as the width of the road allowed, and the stage might have passed, by turning out on the other side. But the driver drove straight on in the middle of the road, and the heavy stage crushed the wagon and severely in-

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\* *Macomber v. Nichols*, 34 Mich. 212.

jured its occupant. The court held the stage-driver responsible for lawless driving.\*

The rule of the road as to foot-passengers who want to cross streets where vehicles are passing is somewhat perplexing. While pedestrians are walking on the sidewalk they have the best right; a vehicle which should come upon the sidewalk and injure a walker would doubtless be required to pay damages. A man in Troy allowed a kicking horse to come out from his stable unattended, and the horse strayed along the sidewalk, and injured a boy who was walking there. The court said the horse-owner must pay damages as matter of course; he had no business to allow such a horse to run loose on the walk.† Along the middle of the block, in the street, the horses and vehicles have the best right: a foot-passenger who tries to cross takes his risk, and must look out for himself; he could hardly recover damages for being run over, unless it were done almost wilfully. At the crossings, neither has any distinct right of way; walkers and drivers have equal privilege, and each must take all reasonable pains to avoid a collision. Foot-passengers can generally stop or turn aside or hasten forward more easily than carts and carriages; this is some reason why they should take more responsibility and care against accidents than is required from drivers.

Of course, as the relative rights of different persons in a public roadway are so vaguely defined, depending chiefly on the question who came first to the spot, controversies between rival claimants to the best place sometimes come into the courts. Such a case was that of the quarrelsome hackmen in Connecticut. There was to be a funeral of a child, and its father employed sexton Potter to superintend the arrangements, and Potter engaged some hackmen. An uncle of the deceased child also bespoke the attendance of a hackman. Potter did not know of this; and when the hour came for the procession to

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\* Bolton v. Colder, 1 Watts, 360.

† Dickson v. McCoy, 39 N. Y. 400.

form, he found a strange hackman occupying a place in the line. He ordered the interloper to back his carriage, and allow one of the drivers he had employed to drive into his place. This driver endeavored to come forward accordingly; but the stranger refused to give place; the two hacks came into collision, and there was, at last, a fight between the drivers, out of which a lawsuit naturally grew. The court explained the legal rights of the case to be that the family had a right to a reasonable occupancy of the street for the purpose of the funeral, and to employ a sexton and intrust to him the general supervision of the procession and carriages. The hackmen employed by the sexton were to be deemed legally in possession of the street for the brief time necessary and proper for the obsequies. If he directed an interloper to retire, the latter was bound to do so, notwithstanding the exact spot occupied by his carriage might have been not actually filled when he drove upon it; and, if he refused to retire, he was in fault for the quarrel.\*

#### DO NOT OBSTRUCT THE SIDEWALK.

In large towns and cities householders find it sometimes convenient, and business men have constant need, to make use of the sidewalks in front of their buildings. The limits of the right to do this are well worth understanding. The rights and liabilities of the tenant of a building, in this respect, are a subject quite distinct from the powers and duties of the city and town authorities in constructing sidewalks and keeping them in good repair. There is a liability of the authorities for defects and obstructions which has often been discussed in the courts. The usual origin of such a suit is that some person who has tripped over an obstruction, or fallen into a hole, or slipped on an icy spot, or has otherwise been injured by some defect, has sued the city or town for damages; and the general doctrine is that municipal author-

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\* *Goodwin v. Avery*, 26 Conn. 585.



ities are in duty bound to keep sidewalks as well as streets free from obstructions and in reasonably good condition for public travel. A more interesting aspect of the right to use the sidewalk is presented when the question arises between some one who is encumbering it for his own convenience and a person who is hindered in passing. The principle is that the right of the general public to pass back and forth is the paramount consideration in determining all controversies of this kind. This is the primary right; and other uses are subordinate.

There was a case in Chicago where injury was done by a counter which some one had moved out upon the sidewalk, without interference by the street officers. The little children of the neighborhood were playing around and climbing upon it one day, when it fell down and crushed one of them to death. The parents sued the city for allowing the counter to stand thus encumbering the sidewalk. But the court said that it was not the duty of the city to keep its streets and sidewalks a safe playground for children. That is not the purpose of streets; they are for travel. If a person walking carefully along the sidewalk, past the counter, had been injured, he could have complained. But parents who let their little child stray away into streets to play could not hold the city responsible for casualties.\*

A unique case illustrating this rule, that sidewalks are primarily for travel, occurred in a village in Essex County, in New York. The real grievance which gave rise to the lawsuit was that the defendant stood outside the plaintiff's house upon the sidewalk, and scolded him through the front windows, calling him names and abusing him violently. But one person cannot very well sue another for calling him names to his face; therefore, the ingenious lawyer whom the householder consulted sued the defendant for trespass in stopping on the sidewalk to call names. The Supreme Court said the suit was good. The land in front

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\* *Chicago v. Starr*, 42 Ill. 174.

of the house was taken for a sidewalk, to enable persons peaceably to pass and repass. Instead of doing that, defendant stood still five minutes, vituperating. While so engaged, he was not using the sidewalk for the lawful purpose, but was a trespasser. And he was adjudged to pay \$20.\* The court, moreover, said that a strolling musician who stops before houses of people who own the land under the street, and object to street music, and who plays and sings after he has been ordered off, is a trespasser; the public right in the street is for travel.—Odd as this case is, it can be matched by one in North Carolina. A householder whose wife lay sick was annoyed by rowdies who paraded back and forth in front of his house, dancing, singing, and cursing. He warned them off, and they only did worse. Then he had them arrested for trespass, and the court adjudged them guilty.†

Skids put up for a few moments at a time, to assist in rolling barrels from a cart into a store, are a lawful use of the sidewalk; at least, so the court in Maine decided. Commercial Street in Portland has a railroad-track through it, and one day a merchant had a car-load of flour brought in front of his door, and his men began to unload it by means of skids. A team came along the street, and the driver wanted to pass, but the skids were in his way. The men who were unloading the flour would not take down the skids, and he drove against them and knocked them down. The court said that loading and unloading vehicles is a part of the legitimate use of the street for travel; and where skids are the most expeditious and convenient mode of doing this, merchants have the right to use them, provided they do not occupy the sidewalk unreasonably long.‡

Crowding a sidewalk caused an odd lawsuit in Wisconsin. The

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\* *Adams v. Rivers*, 11 *Barb.* 390.

† *State v. Widenhouse*, 71 *N. C.* 279.

‡ *Mathews v. Kelsey*, 58 *Me.* 56.

law of the town was that the sidewalk should be fourteen feet wide, and the outside ten feet kept free of all obstructions. A shopkeeper erected a lemonade-stand in front of his store-door. It was made altogether within the inner four feet; did not obtrude on the ten-foot strip at all. But his lemonade was so popular as to keep a little crowd of purchasers waiting in front of the stand; and as these occupied the ten-foot strip and hindered people from passing, the town officers ordered the shopkeeper to remove the stand. He refused. They undertook to compel him, and there was quite a little fight. The court decided in favor of the stand-owner.\*

It should be generally understood that the principal object of sidewalks is to facilitate persons who wish to use them for passing; and this use must not be interfered with, except as may be unavoidable. If goods or furniture are brought to the door of a store or house, the owner has a right to carry them in across the walk, for this is using the sidewalk for passing just as truly as is carrying the same thing along the sidewalk lengthwise. And any temporary leaving of them standing on the walk which is merely incidental to carrying them across may be defended as lawful. But any practices of displaying goods or storing them on the walk, of encroaching on the walk by stands and booths, keeping carts on it overnight, or even planting shade-trees, are only tolerated by the law so far as they do not interfere with the use of the walk for travel.

#### SCARED HORSES.

Curious lawsuits have arisen where a horse driven along the highway, has been frightened by something he sees or hears, has run away, and his rider or driver has been injured in consequence. Under such circumstances, the person hurt is apt to consider that he is entitled, as matter of course, to have damages from the

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\* *Barling v. West*, 29 Wis. 307.



owner of whatever caused the fright. But this is not always the law. Such cases are generally decided upon the principle that all travellers have equal rights to use the highway, the "first come" being entitled to be "first served;" and that any person who assumes to use the highway for any other purpose than peaceable, orderly travel takes his own risk of any accidents which he may sustain, and is liable for any which he causes. Thus if a horse is frightened by the vehicles or sounds of lawful, peaceable travellers, there is, generally, no redress. But if he is alarmed by any misuse of the road, any perversion of it to some other use than travelling, the injured persons may have damages.

There is, for example, a traditional lawsuit in which the proprietor of a travelling menagerie sent the elephant, led (or ridden) by a keeper, in the gray of the morning, along the high-road to the next town appointed for opening his show. The creature was doubtless clothed in that disguise of canvas which is usually employed when elephants travel, to diminish as much as possible their personal attractions in the sight of the non-paying public who may meet them on the way. Clothed or naked, this elephant loomed upon the gaze of a horse driven along the same road. What thoughts crossed the horse's mind are not known. His action was short, sharp, and decisive, and led to an action for damages; perhaps against the proprietors of the menagerie for "collision," or perhaps against the authorities of the town for allowing an "obstruction" in the highway. The court ruled that a highway is for public travel of all alike, white and colored, old and young, man and beast. An educated and well-behaved elephant has as good a right to walk in the manner of locomotion which nature has assigned to him along the public road from the town of A to the town of B, in the prosecution of his business of amusing the public, as has the gayest trotting-horse to dash over the same road for the exhilaration of his owner. He is not an "obstruction;" nor is his owner, if not chargeable

with negligence in the manner of leading the beast, liable for fright of horses. Very likely it was hearing of this decision which led the New York Legislature to enact that proprietors of travelling menageries must send a courier in advance to warn too susceptible horses upon the road of the fearful sights that are approaching.—There has been, and very recently, an elephant trial in London. The circumstances were that a young lady drove in her pony-carriage to see a menagerie. After the show was over and she was seated in her carriage for returning, the keepers led the elephant out into the open street. They gave notice by shouting to the people around to “take care; the elephant is coming.” But this was not sufficient to relieve the apprehensions of the young lady’s pony, which started, reared, upset the carriage, and injured the fair occupant. In her lawsuit for damages the elephant was brought into court; apparently not so much with the expectation of examining it as a witness as for the purpose of convincing the jury, ocularly, how gentle and unterrifying a creature it was. It is styled, by the way, in the law-books describing the case, a “baby” elephant, because less than ten years old. There was a good deal of fun among the lawyers over this method of trying the case; but the judge thought that no damages could be allowed unless the young lady could prove that the menagerie men were careless in their management of their pet; and as the chance of doing this was not very great, the proprietor offered to pay the doctor’s bills on the understanding that no fault was found with the elephant or the keepers; and the plaintiff, by her lawyers, accepted this compensation.

Bees and elephants are not much alike in personal appearance, but in the legal aspect in which they are found presented in such lawsuits there is considerable resemblance. In a bee case the owner of a hive of bees kept it for eight or nine years in his yard alongside the highway, and all this time the neighbors were accustomed to walk or drive past, and were never molested. But, of a sudden, the bees resolved that such practices must be

stopped; they would make an example of the next man. Earl was the next man. He came driving a team of horses quietly and peaceably by the hive, when the bees rushed out and stung the horses so that they died. Lawsuit for damages. The court cited any number of decisions on the right to keep wild and ferocious beasts, but decided that bees are not wild beasts, but rather assimilate to the nature of the domestic birds. A man has a right to keep bees for their honey or their music if he pleases. Hence he cannot be cast in damages for their natural and ordinary bee-havior. The owner of the dead horses could not recover unless the jury were satisfied that the bee-keeper was chargeable with some negligence in his manner of keeping and guarding his pets.

The employment of locomotives and railway trains near highways or in city streets has given rise to many questions of this sort. They are governed by a doctrine which is quite well established. Before a railroad is authorized in city streets, it is always a grave question whether the public inconvenience from frightening horses will not be so serious as to outweigh the benefits of the road. But when the political authorities have decided in favor of the road, and given the company leave to build it, all that is required from the company is that they run their trains with care and prudence commensurate to the case. If horses are frightened through negligence of engineers or conductors, the company must pay damages. But they are not held to pay because the natural proper running of the trains does such mischief. Thus the London papers, a year or two ago, chronicled a case in which a lady of the aristocracy suffered injury through her spirited horses taking fright at the mysterious movements of a dummy engine, and sued for damages, supposing that, of course, she had a right to be paid because her horses were frightened. But the court ascertained that the company had acquired the right to run the dummy in that street, and that there was no negligence on that day, and then ruled that



the suit would not lie. The dummy had as good a right to run as the horses. If the dummy frightened the horses, that was the carriage-owner's lookout. If the carriage frightened the dummy, that was the company's loss.—Nearly the same thing happened in Nebraska in the scarecrow case. A man sued because, as he said, he drove in his buggy to the railroad depot, and there the company had arranged a "scarecrow" near the wagon-road crossing, by placing its cars in such a manner as to present "a horrid and frightful appearance," one of them bottom side up, and another half loaded with sprawling timbers, which frightened his horse, and he himself was thrown out of the buggy and badly hurt. But the court held that the company was not to pay damages because the horse was frightened at the aspect of the cars, but only if the cars were placed or managed in some wrong or improper way.\*

What about blowing whistles? In some places a railroad company is required by law to sound a whistle at a crossing. If they do so, and a horse is frightened, must the company pay damages? No. In Connecticut a countryman drove up to the door of a country store, tied his horse to a post, and went in to trade. Near by was a factory, and when twelve o'clock came the engineer sounded the steam-whistle to send the operatives home to dinner. It was a loud, sharp whistle, and frightened the horse. He had a bad habit of pulling at his halter; and when he heard this whistle, he pulled so hard that the halter broke; and from the breaking of the halter his neck was broken. Lawsuit for damages. The court said, No. The factory had a right to blow a whistle, and the horse ought not to have pulled his own head off on that account.†

The foregoing are a few only of the cases of this description which have occurred. They are enough to show that whoever

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\* *Atchison, &c., R. R. Co. v. Lorce*, 4 *Neb.* 446.

† *Parker v. Union Woollen Co.*, 42 *Conn.* 399.

is using a highway for lawful travel, and in a prudent manner, is not responsible for mischief done by another's horse becoming frightened.—Quite different are the decisions where a street is used for some other purpose than travel, or where there is negligence. Such was the case of the dancing bears of Madison, Wis. Their proprietor applied at the mayor's office for a permit to exhibit his pets. It was granted, and he led them out upon a chief street to dance for the amusement of the populace. Instead of amusing a spirited horse which was driven through the street, the performance frightened him into a run, the carriage was upset, and the occupants thrown out and badly hurt. Action against the city for damages brought a verdict for the plaintiffs. The court said that dancing bears upon a city sidewalk were an obstruction to the highway, for allowing which the authorities must pay.—In a certain case in Maine the element of negligence was curiously presented. A father permitted his daughter, a young girl, to take a ride with his horse and wagon. She was quietly and carefully driving along the highway near her father's house, when "an animal called by various names, such as hog, sow, swine, and by the classical counsel for plaintiff *monstrum horrendum*, aged, of large size, filthy, unclean by the Levitical, and prohibited from running at large in the streets by the statute, law" (this is the judge's own description of the creature), suddenly arose from the gutter and frightened the horse, which ran away, and the wagon was smashed, and the young lady thrown out and hurt. The hog, be it observed, did no obnoxious act; it was his mere personal appearance which alarmed the horse. The court held the owner of the hog liable for the damages because he was negligent in letting the beast go without a keeper.\* Besides, the animal was not travelling; highways are for travelling, not for lying in gutters.—Very consonant to this decision is the New Hampshire pigsty case, where

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\* Jewett v. Gage, 55 Me. 538.

a man built his pigsty from his yard out into the highway, and when a lady drove by, her horses were frightened by the squealing of the pigs, and ran, and she was thrown out and hurt. The town had to pay damages here, because the overseers were in fault for not compelling the farmer to remove the sty.



## CHAPTER XXVIII.

## FINDING AND STEALING.

THE frequent announcements of losses of valuable parcels, ranging from two-hundred-thousand-dollar packets of money and securities down to portemonnaies, watches, and jewelry, may well awaken interest among sharp-sighted city pedestrians in what has been adjudged about the rights and duties of finders. For a majority of lost things there are finders. What are their obligations and claims?

## LOST GOODS.

Suppose one comes upon a lost article—a wallet on the sidewalk, a stray cow or horse, a bundle of goods fallen from a passing wagon: he is not bound to pick it up, or to say or do anything about it. There is a story of an Irishman who was cheated by means of a counterfeit five-dollar bill. Next day he espied a genuine five-dollar bill lying in the path. He gave it a wide berth. “Bad luck to ye! I lost five dollars by a brother o’ yours yesterday.” Patrick was acting strictly in the exercise of his constitutional rights. One who meets with what another has lost is not under any duty to meddle with it; he may leave it alone if he likes. But if he chooses to take it in charge, he takes it subject to the duty of making all reasonable effort, under the circumstances, to restore it to the owner. A thing that is lost still continues the property of its owner. If the finder takes it up intending to keep it, when by marks on it, or other circumstances, he could, if he would try, restore it to the owner, he is guilty of stealing. If his intention was honest when he took the article, but he afterwards changes his mind, neglects to

seek the owner, and spends the money, or uses the thing as his own, he is not quite a thief in the law as it prevails in most parts of the country, but he is liable to an action by the owner whenever his wrongful appropriation of what he has found is discovered. But if the true owner never appears, the thing belongs to the finder. And, as a general rule, no third person has a right to take "treasure trove" away from the finder. The finder's right is better than that of any one else except that of the loser. Therefore the case which was narrated in the newspapers of a factory-girl in a paper-mill who found two fifty-dollar bills in the rags she was assorting was doubtless correctly decided. The proprietor of the mills claimed the notes because they were found in his rags; and when the girl refused to surrender them, he complained of her for stealing. But the judge decided in her favor.—A similar case occurred in Rhode Island. A man bought a second-hand safe on speculation; it was so old and worn that he offered to sell it to the blacksmith of the place for ten dollars, but the latter declined. Then he engaged the blacksmith to put the safe in repair, and keep it for him till he should find a buyer. In repairing the safe, the blacksmith found a parcel of one hundred and sixty-five dollars concealed, by some mistake or oversight, in a crevice in the sheet-iron lining. When he returned the safe, he kept the money; but the safe-owner, having by some means learned the circumstances, sued him for it. The decision was in favor of the blacksmith.\* The principle which explains both these cases is that the money, having been lost in the rags or the safe, still belonged to its original owner, and the finder had the right to keep it until that owner should claim it. The purchaser of the rags or safe did not by his purchase acquire any title to the money concealed in them, because neither buyer nor seller knew it was there, or intended a sale of parcels of money. Having, therefore, no title,

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\* *Durfee v. Jones*, 11 R. I. 588.

he could not take the money from the finder. In one or two instances where a passenger in a steamboat or railroad has found something lost in the boat or car by a former passenger, and the captain or conductor has claimed to take it, the courts have decided in favor of the finder for like reasons. There is a tradition of a case differently decided where a lady, while shopping, laid her portemonnaie on the counter, meaning to take it up again as soon as she had priced some goods. But she left without doing so, and another customer saw it and picked it up. The proprietor of the store demanded it, while the finder resisted his claim. The court, after looking at the case with a magnifying-glass, decided in favor of the shopkeeper. The judges said that this portemonnaie was not lost; it was deposited in an ill-chosen, insecure place; the lady did not drop it by accident, but intentionally left it where she thought it would be safe—in a place which was in law in the charge and care of the shopkeeper. He was therefore held entitled to claim it as a depositary.

#### REWARDS.

Suppose a reward is offered. The courts have, in several cases, decided that an advertisement offering a reward is a valid and binding promise, and can be enforced by one who complies with its conditions. It is a general offer to pay for a certain service; and if a person accepts the offer and renders the service before the offer has been withdrawn, there is a complete contract. But he must have known of the offer. One who finds the lost thing, without knowing a reward has been offered, has no legal claim. In a case in Connecticut, a man lost a horse and wagon, and posted handbills offering a reward of fifty dollars for recovery of the property, and twenty-five dollars for arrest of the thief. Some one, without having heard of the offer, found the horse and wagon, and brought them home to the owner, who handed him two dollars "for his trouble." This the finder accepted; but afterwards, when he heard of the handbills, he was naturally



displeased, and brought suit for the other forty-eight dollars. The court decided against him.\* As he had not heard of the offer, he could not be deemed to have accepted it, and was entitled, not to the sum offered, but to a fair payment for his trouble; and for this he had accepted two dollars.

On this subject, therefore, the law is probably stricter and more technical than the usage of the people and the common-sense opinions of most persons. Unless a finder is influenced by the offer to undertake the search, there is no ground for saying that the loser is under an agreement to pay the specific sum offered. Therefore, if a bank clerk should drop a money parcel, and some one, following soon after, should pick it up and keep it till a reward was offered, and the bank should offer a reward of \$5000, and he should then return it and demand the reward, it is probable he could not sustain his demand at law. He could not claim it for finding and saving the parcel; for these things were done before he knew of the offer—in fact, before it was made. He could not claim it for returning the parcel to the bank; for this was only his legal duty, and would not form a consideration for a promise of \$5000, though it might entitle him to a fair payment for the responsible service of carrying the parcel to its owners. The offer of a reward would be, in strict law, available only to persons who were informed of it, and were induced by it to search, with the risk of losing all their labor if they did not find the parcel.

#### LIVE ANIMALS.

The rule as to finders' rights is more difficult of application when live animals are found; as, for example, in Charley Bradford's case. Charley was arrested and brought before a police-justice upon the charge of stealing a dog. His defence was intelligent and successful, so much so that he was discharged with

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\* *Marvin v. Treat*, 37 *Conn.* 96.

a reprimand. The police reports described him as a mild, open-faced, blue-eyed, ingenuous-mannered boy of ten years old—a New York street urchin, of considerable native shrewdness, and very slight traces of moral training. The dog in question was a “brindle pup.” No owner appeared to prosecute. The dog made no complaint. The arrest was made by some policeman of his own motion. Hence Charley’s presentation of his case was unobscured by any counter-argument. It ably presents the question, What is stealing, when you speak of animals?

“Now, boy, what have you to say about taking this dog?”—“Well, you see, I have known this dog for two weeks up in Seventy-first Street, where I live. He was always follerin’ of me, and we got to like each other.”

“Didn’t you know whose dog it was?”—“Well, I suppose I could have found out by inquiren’ around. But I haint got time for that; and then the dog liked me better than he did his boss.”

“Did you steal him?”—“Well, you don’t call it stealin’ when a dog that likes you comes along, and you can’t get rid of him, do you?”

“Didn’t you have a rope, with the dog at one end?”—“No, I didn’t have any rope at all.”

“Did you whistle to the dog?”—“Is there any law against a fellow whistlin’ this way if he wants to?” Here Charley whistled after the enticing manner of small boys to dogs.

“Did you whistle without seeing the dog?”—“I didn’t see him at all. I was very careful not to look for him. I just went along whistlin’, and lookin’ up at the sky, and the dog followed me—that’s all. He’s always follerin’ me, that dog is.”

“Didn’t you want him?”—“Of course I did.”

“And don’t you call that stealing?”—“No, I don’t call it stealin’! You can’t shake a dog what likes you, and *will* fol-ler.”

This closed the case, which will, doubtless, become one of the “leading cases.” It will be observed that Charley made no

point that it is not stealing to take a dog. Had he urged this, the magistrate must have overruled him, for by law in New York a dog is property and can be stolen.—But such was not the old English law, and is not law everywhere in the Union. As lately as 1875, in Ohio, a fellow was indicted for attempting to steal a watch-dog, worth twenty-five dollars, out of a stable at night, and the Supreme Court decided that Ohio dogs cannot be a subject of theft, because they are not “goods and chattels.” The Supreme Court of Alabama decided the same rule in 1872.

And the law is not less perplexing as to other animals. The courts have instituted a rule like this: that tame or domestic animals can be stolen, but wild ones cannot be, unless, indeed, they are caught and kept by owners. Bees in hives are tame, and it is stealing to carry away a man's hive of bees; but when they are flying abroad, or are wild bees housing themselves in trees, they cannot be stolen, for they are not property, not even when the owner of the land keeps watch over them in the tree. Domestic fowls can be stolen, but not wild ones.—Thus, in North Carolina, where there are wild turkeys and domesticated ones, it is not stealing to appropriate a wild turkey, but taking one of the tame kind out of a farm-yard is.—In Massachusetts, when the question arose about stealing some doves, the court said it depended on whether they were kept in a dove-house or were accustomed to fly about wild.\*—In New Hampshire, a boy set a trap in the woods, and a marten (the little beast of that name, not the bird martin) was caught in it. Before the owner of the trap came for it, another fellow took it away. And the court held that this was not stealing, for the creature had not become property.†—The judges have, naturally, bestowed considerable attention upon oysters with reference to this general question, and they say that oysters growing naturally on the sea-coast are

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\* *Commonwealth v. Chace*, 9 *Pick.* 15.

† *Norton v. Ladd*, 5 *N. H.* 203.



not subjects of theft. But if a man has "planted" oysters in a place which is not a natural oyster-bed, and has marked the place so that persons can know the oysters are claimed as private property, then it is stealing to take them away. So, at least, says the Supreme Court of New Jersey, being of opinion that oysters are not "wild animals."\*—There is a well-known case, where eight cows, belonging to a farmer in Westchester County, broke through his fence, and went wandering along the highway. Three tramps met them, escorted them down to New York city, and there butchered and sold them. On the trial for stealing, the lawyers argued that these were wild cows, and that while they were escaped from their owner, and on the public road, it was not stealing to take them. But the judge said he presumed that the cows meant to go back again after they had enjoyed a moderate stroll, and, if so, they had not lost their domestic character.†—Charley's acute point, that it is not stealing to whistle to a dog, is something like the case in a New York city police-court, years ago, where two girls were tried for stealing a canary-bird. The witnesses testified that there was a quarrel between the girls and their next-door neighbors; and that one day, when the neighbors had their canary-bird hanging in its cage over a stoop in their back-yard, one of the girls took it down and handed it over the fence to the other, who carried it away, and it had not been seen since. But this was done to annoy the neighbors, not for the purpose of making use of the bird as property, for it was of no value. And the judge said that the offence was only mischief. There was no stealing unless the thing was taken for gain.

Once upon a time, in a country called Alabama, there was a law that all the black people should belong to the white people. In other countries, not far away, this was not the law, but the

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\* *State v. Taylor*, 27 *N. J. L.* 117.

† *People v. Kaatz*, 3 *Park. Cr.* 129.

black people in them were free. There was a black girl in Mobile named Jane, who belonged, by the law of Alabama, to a white man there; but Hawkins took Jane out of the possession of her owner, and put her on board a vessel just then sailing to one of the free States. He was tried for stealing Jane; for, the prosecution argued, Jane is my chattel, and putting her on board this ship to carry her away was stealing my property. But it was proved, in Hawkins's behalf, that he did not intend to sell Jane again, or make any profit himself by carrying her away: his only motive was to set her free. The Supreme Court of the State adjudged that this was not stealing. The offence, if any, was a violation of such law as there might be against enticing away a slave. Assisting a slave to escape, from sympathy, not for gain, was not larceny.\*

#### LARCENY BY TRICK AND DEVICE.

These instances indicate that there are many nice distinctions in the law of stealing, or larceny, as it is technically called. In recent years many of the States have passed statutes declaring what shall be considered theft and punished as such, in distinction from embezzlement, false pretences, malicious mischief, conversion, borrowing and not returning, and other forms of depriving a person of his property. These statutes have caused the law of the subject to differ somewhat in different places. Even before they were passed, and when there was one tolerably uniform law for the whole country, it was not always easy to say what would be pronounced larceny. The thing taken must be legally property. One who took away another's dog, or bird, or love-letters, or keepsake, having no money value, might escape punishment on the ground that the thing was not a subject of ownership. It must be removed—carried away. One who should shoot a cow, letting her fall dead where she stood, might

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\* *State v. Hawkins*, 8 *Port.* 461.

escape for the reason there had been no "asportation." There must be an intent to obtain the thing for one's self. One who should upset a barrel of liquor and let it soak into the ground might escape because he had not appropriated the thing to his own benefit. And these things must be done with effect to deprive the owner of his property against his consent. One who coaxed or persuaded another to give him the thing could not be punished for stealing it. If the owner intentionally consented to transfer his ownership, the case was not stealing, no matter what false device or pretence was employed to gain his consent. Some of the cases upon this distinction very well illustrate the hair-splitting ingenuity of lawyers and the extreme care of judges.

Thus, it is quite well established that if two persons are negotiating in the horse-market for a sale of a horse, and the owner allows the customer to mount the horse and ride him, to try his pace, and the customer rides away and keeps the horse, this is stealing; for the horse was not delivered to him—he only had leave to ride. But there was a case once in England where the customer asked the price of the horse, and the seller said eight pounds, and told the groom to deliver the horse. The customer mounted, saying to the seller that he would return immediately and pay him. The seller answered, "Very well," and the customer rode away, but never came back with the money. The judge said this was not stealing; for the horse was sold and delivered as property, on credit.\*

There is a story of a landlady of an English lodging-house who one day wanted a large bank-note changed, and sent it by the servant-girl up-stairs to a lodger, to ask if he would change it. He told the girl he had not gold enough in his wallet, but would take the note out to his bankers and get the change from them. She let him take the note away, and he never came back.

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\* Harvey's Case, 2 *Leach*, 523.



This was decided to be stealing, because the landlady did not intend to part with the note unless she had the change. The servant-girl had no authority to deliver it to the prisoner to take it away with him, and so it never came into his possession as his property.\*—So there are two cases of messengers convicted of stealing things given them to carry to customers.† In one, a farmer sent his man with some pigs to show to a lady who wanted to buy a pig, but charged the man to bring the pigs back—he was only to show them, not to sell and take the money. In the other, a footman came to a silversmith's with a false story that his master wanted to buy a silver pitcher, and the silversmith let him take two for the master to choose from. In these cases the messengers sold the pigs and pitchers, and were sent to jail for stealing, for the judges said the owners did not give the things to them as property, but only to carry back and forth.

A scamp called at a silk-dealer's and selected two pieces of silk, and asked to have them sent to his house, where he would pay for them. The shopman took them there accordingly, and the buyer deceived him into taking false bills in payment. Meantime the goods had been charged to the buyer on the silk-merchant's books. The judges held that this was not stealing, because the shopman was authorized to deliver the goods on receiving payment, and he had supposed the bills given him were payment, and had intended to deliver the silk as property.

A sharper in a Cincinnati railroad depot drew a passenger awaiting a train into conversation, and while they stood chatting a third man came up and accosted the sharper with, "If you want to go on this train, you had better get your baggage and pay your freight bill." The sharper turned to the passenger and said he had only gold about him, and the railroad men would not allow

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\* Campbell's Case, 2 *Leach*, 642.

† Reg. v. Harvey, 9 *Carr. & P.* 353; Rex v. Davenport, 2 *Russ. Cr.* 28.

him any premium on it, nor let him have his things until he had paid freight. "Will you," said he, "let me have \$280 in currency, and I will give you this gold to hold as security until I can draw bills out of the bank and pay you." The passenger let him have \$280 in bills, and took what he supposed were gold pieces, but found, on examining them afterwards, that they were worthless. He complained of this as stealing, but the Supreme Court of Ohio said that as he intended to let the fellow have the bills and spend them, and pay him back in other bills, he had voluntarily parted with his property, and the case was not stealing, but swindling or false pretences.\*—In Illinois, a case very nearly like this was decided the other way. The accused were carrying on the "ball and safe game," as it is called, and one of them appealed to a bystander to lend him some money to bet on his finding the ball. He declared very positively he could see the trick and was positive of winning the bet; and the bystander lent him the cash. Of course, it was lost; and there was a prosecution for stealing. The court held that if the bystander was deceived by the prisoner's positive assurances that he could not lose the money, but would win the bet, so that the owner of the money did not expect it would be spent and paid back in other money, but expected the same bills to come back as soon as the bet was decided, then he had not parted with the possession of the money as property, but had only allowed the scamp to have the custody of it for a temporary purpose. So there was a conviction for stealing.†—An instance still nearer the line between stealing and swindling occurred in Indiana. The sharper pretended to be a general agent for some large clothing establishment in San Francisco, and cajoled a countryman whom he met in the street in Richmond, Ind., to undertake

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\* *Kellogg v. State*, 26 *Ohio St.* 15.

† *Welsh v. People*, 17 *Ill.* 339. Like decisions are, *Stinson v. People*, 43 *Ill.* 397; *Loomis v. People*, 67 *N. Y.* 322.

a local agency. The offer he made was that if the countryman would give him \$50 in currency, he would give the countryman \$100 in gold and an outfit of samples by which he might negotiate sales. He exhibited the gold, or what looked like it, as they were conversing, and slipped it back into his pocket. The countryman accepted the proposal, gave the currency, and asked for the gold; but the sharper, saying he would "be back in a moment," deftly slipped out of the room and never returned. The judges considered that, as the getting possession of the currency was accomplished by a trick performed with intention, from the beginning, of stealing, the case was larceny.\*

In these various cases where the person charged as a thief gets the thing into his control by consent of the owner, the question usually is whether the owner intended to part with the ownership of it to him, or whether he only meant he should take it to return it or put it to some particular use for the owner. If he intended to part with the ownership, the case is not larceny. But this rule does not mean that the accused cannot be punished at all, but that he must be tried for cheating, not for stealing. And in some places the law of larceny has been extended to cover some of these cases by calling them larceny by trick and device.

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\* *Huber v. State*, 57 *Ind.* 341.



## CHAPTER XXIX.

## TUMBLE-DOWNS.

As the elevator carriage in a New York city hotel was one day nearing the upper story, the chain gave way, and the carriage fell to the basement. It struck and killed the engineer, who was, unhappily, just then underneath. In barbarous life man is tolerably secure against fatalities from anything falling upon the top of his head; but civilized arts have given rise to a variety of perils of this nature. The balloons, elevated railways, and lofty buildings and scaffoldings above, and the mines, wells, cellars, and tunnels beneath, are rapidly transforming Terra into a three-story habitation; and modern law is often obliged to take cognizance of what, until a better technical term is introduced, may be called "tumble-downs." The law of the land stands ready to redress any carelessness or negligent infraction of the cranium by an award of damages; yet, when such suits are brought, too often one of the familiar defences "nobody to blame" or "his own fault" defeats the claim. In other words, the plaintiff recovers if defendant was negligent and plaintiff was not so. Defendant wins the suit if he can show either that he was not in fault or that plaintiff himself was careless.

In perhaps a majority of cases the circumstances themselves show, without any particular argument, that the proprietors of the building or mine, etc., were in fault.—In Chicago, one day, a lady was passing along the sidewalk, underneath a swinging scaffold against a building upon which some workmen were putting up a new sign, and just as she came beneath a hammer slipped off the platform and struck her upon the head. She recovered \$500 damages. The court said it was gross negligence for the

workmen to use tools on such a staging over a city sidewalk without placing an edge or railing around it to keep their tools from slipping off.\*—In Liverpool, as a pedestrian was passing a large flour-store, a barrel of flour fell upon him from one of the upper stories. On the trial of the action which he brought against the proprietor, none of the witnesses knew, or none would tell, how the barrel came to fall, and the proprietor's counsel argued that he must go free, because there was no proof that he was to blame. But the judges overruled this. They said it was not the plaintiff's duty to ascertain how the barrel came to roll out of the window. Owners of barrels in storerooms must take care they do not roll out. Whoever lets things fall from housetops upon travellers in the street below must explain how he came to do so, or pay damages.†—The same decision was made in a London case, where an inspector or examiner from the Custom-house was walking about London docks attending to his duties, and came underneath a crane, and six bags of sugar fell upon him. The court said he need not show how they came to fall; the men who dropped them might do that.‡

Down in a coal-mine is a good place for rocks to fall on one. An Illinois boy was killed in this manner, and his father recovered nearly \$1200 damages, because the shaft down which the bit of rock fell was not properly fitted and guarded to prevent such accidents.§—Snow and ice are permitted to fall from roofs of houses upon the sidewalks much oftener than they ought. It is against the law, and renders the owner of the building liable to any person injured. In a New York case of this sort, the occupant of a dwelling directed his servant to shovel the snow off his roof; the servant asked a companion to help him, who shov-

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\* *Hunt v. Hoyt*, 20 *Ill.* 544.

† *Byrne v. Boadle*, 33 *Law J. Exch.* 13.

‡ *Scott v. London Dock Co.*, 34 *Law J. Exch.* 220.

§ *Quincy Coal Co. v. Hood*, 77 *Ill.* 68.

elled pieces of ice off the front, one of which struck Warner, passing along the sidewalk, and killed him. The housekeeper thought he was not liable for this, because neither he nor his servant was careless; but the court said that, as he ordered it done, he was responsible for the whole job; and he had to pay \$3500.\*

But although, in these cases, the fault on the part of the defendants is taken for granted, as it were, yet it is an essential fact. And if the circumstances are such as to show that the persons sued were not in any respect to blame for the casualty, they will not have to pay damages. This is illustrated by the story of what befell Miss Kendall in Boston. A few years ago, when the Grand-duke Alexis made his noted visit to this country, the city of Boston gave a great entertainment in his honor. The Common Council appointed a committee of arrangements; and this committee engaged the Music Hall and issued tickets for a concert. One of these tickets came to the hands of Miss Kendall, and she attended. Her seat was just under a balcony which was built around the upper part of the Hall; and this balcony bore various architectural ornaments, one of which was a bust of Benjamin Franklin. The printed programme requested the audience to rise when *Old Hundred* should be sung. The immense crowd arose accordingly, Miss Kendall among them. At that moment, from some cause unknown, the bust of Franklin fell upon her and broke her shoulder. She brought two suits, one against the city corporation, and one against the gentlemen of the committee. Apparently her lawyers had read so many cases in which fault on the part of the owners of the property has been taken for granted from the mere fact of the tumble-down that they took that for granted upon the trial of these suits. They supposed that the difficult question would be whether the city or the committee-men must pay. But the court decided against

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\* *Althorf v. Wolfe*, 22 N. Y. 355.



both suits on the ground that neither city nor committee was negligent. The judges said that in ordinary cases, such as those already described in this chapter, the proprietors of a structure, etc., are supposed to be in fault when any part of it falls, unless they can prove the contrary, because they are responsible for the manner of constructing it. But in this instance neither the city nor the committee had anything to do with fastening the bust of Franklin in its place. They did not own the building, nor put up the bust, nor give orders to have it done. They simply hired a building which every person supposed to be suitable and substantial, and gave Miss Kendall an invitation to attend the concert. As far as they were concerned, the injury was a pure accident.

Upon the other hand, any carelessness or fault of the injured person contributing to the casualty defeats his action for damages. There have been several instances of this. One was an elevator case. The elevator in question was in a Massachusetts factory, and the time was ten years ago, before the recent improvements. The elevator was operated by an attendant stationed in the attic, who was accustomed to let it down, on signal, as far as it was wanted. A workman who wished to be carried up signalled from below, and naturally put his head within the hoistway to watch the progress of the carriage downward, when the chain broke, and the descending carriage struck his head. In his lawsuit for damages the judge decided against him for carelessness in standing underneath, and not looking more intently, so as to keep out of the way. But the Supreme Court overruled this; they said the man's conduct was not necessarily careless.\*—The principle has more recently been explained again with reference to a case of falling down the hatchway of an elevator. The place of the casualty was the building occupied by the Portland Publishing Company, in Portland, Me. The

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\* *Hackett v. Middlesex Manf. Co.*, 101 *Mass.* 101.

time was midnight, in September. The experimenter, or victim, as one pleases to regard him, was an advertiser who desired to procure a notice inserted in next morning's paper, notwithstanding the late hour. The counting-room, upon the ground-floor, was closed for the night, and the lights in the stairways and halls above had been extinguished. He began groping his way up-stairs to the composing-rooms in search of some obliging *sub.* who would insert his tardy notice, when he came, unawares, upon the door of the elevator-way, which had been carelessly left open; he fell through, and was badly hurt. He sued the proprietors of the paper, claiming that leaving the door open and the hall dark was a neglect of their duty to the public. The court, however, said that while it may be very true that proprietors of a shop, office, or newspaper-room are understood to give a general invitation to customers to visit it, and are bound to keep the premises in good order, yet this invitation is understood as applying only during business hours. Shutting up the rooms and turning out the lights were some notice to the general public that business was over for the day, and that their visits were no longer expected. Besides, if the proprietors were negligent, that did not excuse the advertiser for his carelessness. Finding no light, he should have turned back and procured one, and might have complained afterwards of the neglect. By undertaking to grope through a dark, unknown passage-way at midnight, he took the risk of the accidents that might befall him. In short, "it was his own fault," which is the brief answer the law gives to many a suit for damages.\*

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\* *Parker v. Portland Publishing Co.*, 9 *Cent. L. J.* 108.

## CHAPTER XXX.

## GAS-EXPLOSIONS.

THE law extends a good degree of protection to gas-light companies in respect to their liability for explosions. Since the use of gas for lighting has become so extensive among the common people, lawsuits for injuries by explosion have frequently arisen, and they are decided by ascertaining who is responsible for the fault or negligence exhibited in the particular case. If the accident result from insufficiency of pipes or fixtures which the company was bound to put in better condition, or from neglect or careless conduct of the persons it sends to make repairs or alterations, the company is responsible. If it result from acts or neglect of the dwellers in the building, the company is free. Gas-companies do not hold their privilege of supplying gas, as incorporated managers of some other dangerous and explosive agencies have been said to hold their franchises, at any special risk of bearing all casualties, or under any special responsibility for explosions. Gas is not dangerous or explosive unless carelessly used after being lighted, or allowed to mix with atmospheric air; hence the legal inquiry is, Whose carelessness brought the casualty about? The company engages to furnish gas, and that all acts and duties devolving on the company or its workmen in supplying or stopping it shall be carefully and skilfully done; that is all. Yet in a number of instances fault has been proved for which the company has been held responsible, and has been required to pay damages.

In a case which occurred in Albany, a dwelling-house was blown up by an explosion of gas in the cellar, and the tenant's wife and daughter were thrown through the ceiling of the room



in which they were sitting, and then fell into the cellar. The mother does not seem to have received permanent injury, but the little girl's thigh was broken, confining her to bed for three months, and permanently shortening the limb. An action was brought in her behalf against the gas-company for damages. Investigation showed that the father noticed a leak of gas in the cellar, did not know the origin, and sent to the company to ascertain and repair it. A workman was sent who lighted a match in the cellar, already filled with the explosive mixture. There was a dispute whether the leak was in the service-pipe, which the company was bound to keep in repair, or in the pipes or fixtures, for which the tenant was responsible. But the courts said that was of no consequence. The immediate cause of the explosion was the light carried in by the workman when he knew there was a leak; and this was negligent, no matter whose pipe was leaking. And as he was the company's servant, sent by its direction, for the express duty of finding the leak, it was liable for his careless way of doing it. The girl recovered \$2000.\*—In two English cases, families who did not take the gas themselves were injured by its escape upon the adjoining premises. In one, the gas-company sent workmen to introduce the gas into the next house; they were careless in their work; there was an explosion in that house; it took fire, and the fire spread to the plaintiff's house by its side. In the other, a heavy wagon travelling the street broke the main pipe, and gas percolated into the plaintiff's cellar, and an explosion was the result. In both these cases, the courts held that the companies must pay damages for their negligence—for the carelessness of the workmen who set the houses on fire, and for omitting proper precautions to discover and cure the leak in the street.†—Still

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\* *Lannen v. Albany Gas-light Co.*, 44 *N. Y.* 459; 46 *Barb.* 264.

† *Blenkiron v. Great Central Gas-Consumers' Co.*, 3 *Law T.*, *N. S.* 327; 2 *Fost. & F.* 437; *Mose v. Hastings, &c., Gas Co.*, 4 *Fost. & F.* 32A.

another story is told of a case where gas escaped from a leak in a defective service-pipe. The tenant of the building happened to have a gas-fitter at work for him in another room of his house, and this man, of his own accord apparently, on hearing about the leak, went with a light into the room where it was, and everything was blown to pieces. The court adjudged that the company was liable, because here a fault was clearly proved against it—in the defective service-pipe; and the tenant was not in fault for the light being carried in, for the man who did that was a stranger who went in of his own accord.\*—In a Georgia case there was an unoccupied house, and the owner notified the company to turn off the gas; they did so, but in a careless, inefficient manner, and it leaked into the house. One evening some negroes asked leave to hold a supper in the house. The owner told them the gas was turned off, but they said they would carry candles. He gave them leave, and they went with their candles, and there was an explosion. The court said the company was bound to use skill and care corresponding to the nature and delicacy of the business, and if it was careless in the matter of turning off, and the house-owner was not in fault for the light, he could make it pay.†—And there has been a New York city case like these. The gas-pipe leading into the house was broken by fault of the company, and gas leaked into the cellar. The tenant sent for a plumber, who struck a light in the cellar to find the leak. He found it. There was a great explosion. The court held that, as the company was responsible for the defect of the pipes, they must pay damages; for, according to the evidence, on the trial, the tenant was not to blame for the carelessness of the plumber.‡

Householders as well as gas-fitters are, at the present day,

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\* *Burrows v. March Gas and Coke Co.*, *L. R.* 7 *Exch.* 96.

† *Chisholm v. Atlanta Gas-light Co.*, 57 *Ga.* 28.

‡ *Schermerhorn v. Metropolitan Gas-light Co.*, 5 *Daly*, 144.

expected to know that gas, mixed with air, forms an explosive compound. This is no longer a matter of recondite science, but of ordinary information; and persons who use gas in dwellings and shops are not allowed to say they did not know it. Mr. Lanigan notified the gas-company to discontinue the supply of gas to his store; when, however, the workmen removed the meter, they left the service-pipe leaking into the cellar. Lanigan, although he knew of the leak, sent servants into the cellar with a light to draw some ale. There was an explosion, by which the servants were killed and the store and goods greatly damaged. The judges said that he was not entitled to any damages from the company because he was himself to blame for sending the light; that every grown person of ordinary intelligence is now expected to understand the danger of taking a candle or lighting a match where gas is escaping; and whoever does so must take the risk of any damage done. Lanigan said he had sent into the cellar in the same way several times before without harm done; but the court said that made no difference.\*

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\* *Lanigan v. New York Gas-light Co.*, 71 N. Y. 29.



## CHAPTER XXXI.

## THE HOUSE OR HOME.

## HOMESTEAD EXEMPTION.

BOOKS inform us of ancient laws by which a debtor who could not pay his debts might, upon demand of his creditors, be cut in pieces and divided bodily among them. Rigor like this had become obsolete long before the commencement of American jurisprudence; but the early law for the collection of debts was rigid in exacting all property that could be obtained from a debtor for the satisfaction of his creditors. In modern years, the view has obtained that creditors shall not have everything; some reservation of property is allowed, to provide for the immediate necessities of an insolvent, and to relieve his family from absolute destitution. This privilege is given by laws of the various States allowing a head of a family to designate by public record a house and lot as his "homestead," which shall not thereafter be taken for his general debts, and by laws prescribing certain kinds and amounts of personal property which shall be "exempt from sale on execution." The principle of allowing a debtor to retain some little property is now recognized throughout the country. Probably every State accords some privilege of exemption of personal property—clothing, a little live-stock and necessary tools for the debtor's farm, a limited number of articles of furniture for the house, wages just earned, and the like; but the different statutes upon the subject include an immense number of petty details.

An exemption of a homestead is now allowed in nearly all the States.\* The laws for this purpose allow a head of a family to

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\* Upon a cursory examination, Connecticut, Delaware, Indiana, Maryland,

establish a home which shall not be sold for his debts, except a debt for the price of it, or secured by mortgage upon it, etc. If the property is a farm, the privilege is limited in about half the States by the number of acres: forty, eighty, or one hundred and sixty is a common limit. In others the restriction is by value, such as \$5000, \$2000, or, in some of the States, less. In Texas two hundred acres may be exempt. If the property is a town or a city lot, the exemption is generally limited by a value corresponding to the value allowed for farms; or the quantity is closely restricted—as, to a quarter or half an acre. The homestead laws usually give the wife of the proprietor some control over any sale or mortgage of the property.

As a general rule, these homestead laws do not give any specific description of the kind of property which may be exempted. They impose a limit of value; but as to what sort of property is included, they generally use simply the word homestead, leaving its meaning to be determined by the courts. Of course, there have been numerous lawsuits as to what may be a homestead; and the decisions are not very consistent, for the curious reason that the judges are not agreed upon the proper principle of construing such a law. Some say that it is an innovation upon the common law, and must be construed strictly; others consider it in the light of a remedial law, which must be liberally construed. It is, however, very generally agreed that, to constitute a homestead, the premises must be occupied for family purposes as a home by one who is a resident thereon, and makes them the dwelling-place of his family. The word itself means the home-place; the place where the house is; the house and the adjoining land, where the head of the family dwells; the home farm;

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Oregon, Pennsylvania, and Rhode Island appear not to have had any homestead exemption laws down to 1879. The other States have them. There is also a United States homestead law, by which a person can take a small tract of vacant public lands for a dwelling-place, and hold it free from any previous debts.—*Rev. Stat.* tit. xxxii, ch. 5.

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that part of a man's landed property which is about or contiguous to his dwelling-house. The California Supreme Court has said that the term represents the dwelling-house at which the family resides, with the usual and appropriate appurtenances, including outbuildings of every kind necessary for family use, and land used for the purposes thereof. If situated in the country, it may include a garden or farm; if in a city or town, it may include one or more lots or blocks. It need not be in a compact body or circumscribed by fences. The only tests are use and value.\*

Actual residence by the family is required. The privilege does not attach until the property is actually occupied and used as a home. A mere intention to occupy, though subsequently carried into effect, is not enough. A homestead is a place where a man eats and sleeps, surrounds himself with the insignia of home, and enjoys its immunities and privileges. In Texas there was one case of a man who kept a grocery-store in a building which he owned. There was a back-room opening from the store, in which he usually slept, and there he kept his clothing; but he took his meals at a tavern. There was another case of a lawyer who owned a little building standing by itself, which he used as a law-office, coming to it in the morning and going away at night. The court said these buildings were not homesteads, for they were not the owners' homes.† They said the same about a house and lot occupied by an unmarried man as a sleeping-place, without servants or other persons connected with him there residing.‡ But if the owner and his family really live upon the place, the circumstance that he carries on business there will not affect his privilege. What is purely or chiefly a place of business cannot be a homestead; but what is chiefly

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\* *Gregg v. Bostwick*, 33 *Cal.* 220; *Estate of Delaney*, 37 *Cal.* 176.

† *Philleo v. Smalley*, 23 *Tex.* 498; *Stanley v. Greenwood*, 24 *Tex.* 224.

‡ *Wilson v. Cochran*, 31 *Tex.* 677.



a home may be one, although a part of it is used for trade ; provided, of course, the property, as a whole, is not of greater value than the law permits.—In a case in California the owner of a “ranch” or farm commenced the erection of a dwelling-house upon it; but before the building was completed he changed his plans, and adapted the edifice to be used also for a hotel. For some years he and his family resided in it, and entertained any travellers who came. At length, his creditors claimed to seize and sell the property for his debts. But the judge said it was fairly his homestead. He said that a building designed and chiefly used as a factory could not be called a homestead merely because the owner, with his family, lived in the garret, nor would an ordinary city store become one because of the merchant’s making his dwelling in the basement; but that in this case of the ranch the original design and principal use of the building were for a dwelling, and the hotel business was secondary, and ought not to be considered as affecting the exemption.\* But the decision of all such questions depends very much upon the particular language of the statute of the State.

It is a very general rule that debts incurred in buying the property, or in making improvements upon it, may be enforced by a sale of it, notwithstanding the exemption law.

#### MECHANICS’ LIEN.

When an owner of land desires to erect a building, he does not usually buy himself the wood, the brick, and the ironmongery needed, nor personally hire and pay the workmen employed. By custom, he makes a contract with a builder for the erection, and the builder makes the purchases and employs the workmen. It has been found that this system is prolific of frauds or losses to those who sell the materials or do the labor. The builder may collect the contract price of the house from

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\* *Ackley v. Chamberlain*, 16 Cal. 181.

the owner and refuse to pay his subordinates, and the latter may lose their remedy against the builder for want of any tangible property belonging to him which they can reach, and against the owner, because he made no contract with them, while they cannot reclaim what they contributed towards the work, because it has become inextricably involved in the building.

To prevent or redress such frauds, laws have gradually been framed in the various States to give the subordinate mechanics a lien upon the property which they assist to improve. Under these laws "material men," as those who sell materials for a building may be called, or laborers, may file a notice, in a designated public office, setting forth what they have done towards a building, and what is due to them for the same. In this way they gain a right to be paid out of the value of the property. If the contractor pays them as he should do, very well. If he does not, the owner may pay them, and deduct from the money due the contractor. If neither will pay, the property may be sold, and the demands paid from the proceeds.

Laws of this description exist in nearly all the States, though they vary greatly in details, and in any one State the law may differ in different counties. In Louisiana and Florida, a lien is allowed for advances made or work done in carrying on a plantation or farm.

#### FIXTURES.

The interesting practical aspect of this subject is that which embraces the right of a tenant when he gives up a house, or of a landowner when he sells his lot or farm, to take away with him the various things which he brought in. In popular usage, the word fixtures is employed merely as designating accessories, things convenient to be used with a building, and without any distinct thought about the right to take them away. Thus, when gas-fixtures or office or store fixtures are mentioned, the term is generally suggestive of articles of intermediate nature between the building itself and the loose furniture in it, but

does not convey any distinct idea as to ownership. In law the word is used with reference to the right of removal, and there is a very curious confusion in the way in which it is employed. Some judges and law-writers use it to denote articles which must not be removed from the building or land; others use it to mean things which may be. And there is a third view, viz., that the word fixture means a chattel annexed—affixed to the real property—but does not indicate anything as to whether it is removable; that question is to be decided by considering the attendant circumstances, and the relation of the parties. This last is very nearly the popular signification.

As long as a house and lot continue to be owned and occupied by the same person, the question is of little or no consequence whether the shelving, the range, the gas pipes and burners, the locks and keys, and the various articles fastened more or less distinctly to the property itself may be taken away. The owner who put them up can, of course, take them down while he remains owner. But it is important for a person who makes improvements of this general character in a building, of which he is not destined to be permanent owner, to know that there are rules of law about the right of taking things away. No summary of these rules can be given which would enable persons to decide for themselves what things may be removed and what must remain. There are few branches of the law in which it is more difficult to predict with certainty what decision would be made in a particular case. But it is worth one's while to understand distinctly that one cannot always remove what he has erected. There is a doctrine that whatever is affixed in a permanent manner, with tokens of intent that it shall remain, or in such a way that its removal will break or mar the real property, becomes in law a part of the real property itself, vests in the person who owns that, and passes by any sale or transfer of that unless it is expressly reserved. Thus, when a landowner dies, a question often arises between his heir who inherits the



real property, and his administrator or executor who is entitled to take his personal property, whether the things which he affixed to his building have become a part of it and are real property, or are still chattels and go with the personals. So a person who has bought a farm has, in many cases, been dissatisfied because the seller has carried away things which the buyer supposed would remain, and thinks he is entitled to have. Again, if the owner of a factory should mortgage it, and afterwards should assume to remove and sell the engines and machinery, this, evidently, might be a gross injustice. Such questions are, in general, decided by examining all the circumstances, especially the nature of the thing and the manner in which it is connected with the lot or the building; and if, upon the whole, it seems to the court that it was introduced as a permanency, or that it cannot be taken away and leave the property in good condition, the decision will usually be that it must stay.

James Thom, the noted sculptor, was, in 1842, the owner of a farm in Rockland County, N. Y. He built there a Gothic dwelling-house; and on the lawn in front of the house he placed a sun-dial and a colossal statue of Washington, as ornaments of the grounds. The dial consisted of a gnomon erected upon a stone pedestal, was nearly four feet high, and weighed about two hundred pounds. The pedestal rested upon a flag-stone which covered the mouth of a well. It was not riveted or cemented, but stood firm by its own weight. The statue was cut from a single block of stone, and was about eight feet in height. It stood upon a base constructed of square blocks of stone; but neither the statue nor the base were in any way fastened together or to the ground; their weight kept them in place. The pedestal, the base, and the statue were all constructed of red stone, which was also the material used for the house; and the correspondence in color heightened the impression which a visitor would naturally receive that the structures were all parts of one plan, and designed to be equally permanent.

Mr. Thom mortgaged the farm, nothing special being said in the mortgage about the dial or the statue. He was not able to pay the mortgage; it was foreclosed, and the property was bought by Warring. Thom owed other debts, and one of his creditors brought suit, recovered judgment, and issued execution. The sheriff came to the farm to see if any personal property could be found which he might sell. He saw the dial and statue, and considered that they were chattels. So he sold them at auction, and they were bought by Snedeker. But when Snedeker came to get them, Warring refused to allow them to be removed; he claimed that they were parts of the farm, and belonged to him in right of the mortgage. Then Snedeker brought a suit. The court decided it against him. The judge said that all the circumstances, taken together, indicated an intention to make these structures permanent ornaments of the place. Any person buying the farm, or lending money upon a mortgage of it, would naturally suppose the statue and dial passed with the house; and it would be unjust and dishonest to take them from him afterwards, unless he was told beforehand that they were reserved. True, they were not clamped down to the soil; they could be lifted and removed without breaking anything, or leaving any unsightly mark or hole. But as clamping was wholly unnecessary, as the mere weight was enough to hold them, the fact that they were not fastened was not enough, by itself, to notify a money-lender that they were liable to be removed. Thom was examined as a witness, and testified that he had cut the statue in the course of his profession as a sculptor, and that he had intended to sell it at some future time, when he should have a good opportunity. But the judge said that his secret intention was not important; the question for the court was, what intention was fairly manifested by the circumstances.

The explanations thus far made relate to transfers of the ownership, such as mortgages and sales. Where the real property has been only leased, and the term is about to expire and

the tenant to remove, the rules of law are very liberal towards allowing him to take away whatever he brought in. The courts have considered that tenants could not be expected to hire either dwellings, shops, stores, or offices, and fit them up with what they require, if the rule were that all the fittings would belong to the landlord at the end of the year or term of years. It is, therefore, if a broad view of the subject is taken, advantageous to landlords as well as to tenants that a good degree of liberty in this respect should be allowed; since, if it were not, letting buildings for short terms would be very much hindered. A tenant is therefore allowed to take down shelving, gas-fixtures, counters in a store, a range in a kitchen, an engine or machine in a workshop, tiles from a floor, paintings on the walls, and, generally, anything of a chattel nature which he has himself erected upon the premises for ornament, domestic use, or to carry on his business. But in exercising this right two things are important: 1st. The erection of fixtures should be planned in such a manner that they can be removed without serious injury to the buildings. 2d. The removal should be before the tenant's term has expired. Although a tenant continues to be the owner of a fixture, his right may be very much embarrassed if the landlord is entitled to forbid his breaking the wall, without which he cannot remove it; or if a new tenant has entered, and refuses to let him come upon the premises to get the article.

#### FURNISHED APARTMENTS AND "FRENCH FLATS."

The law as to leasing entire houses has been administered for many years in a steady, even way, without marked changes, and has become quite familiar. The rapid development, in large cities, during recent times, of the practice of letting suites of apartments has given rise to some novel rules and entertaining decisions. There is not, indeed, any wide difference in general principle between leasing a whole building and letting a room or a suite; but there are some differences in details. The con-



struction and uses of "apartment buildings" differ somewhat from dwelling-houses, and the manners and customs of lodgers are not quite the same as those of yearly tenants. These differences have required some novel modifications of the law of landlord and tenant in cases where an apartment, not a house, is in question.

Apartments and flats are usually hired by the week or month. Where this is the case, no written agreement is necessary, and it is not common to make one. The law allows people to trust to memory in these short contracts. Many persons would think that a lodger or monthly tenant was too precise, and even uncivil, if he should ask for a lease in writing. Yet disputes often arise for want of one. It is a good plan for any person who is negotiating for hiring apartments (or for letting them) to make a memorandum of the terms. As the discussion proceeds, let him note down, in an informal way, the points that are agreed: "Rooms taken for four weeks; rent, ten dollars at the end of each week, service included; gas, extra, fifty cents." The other party will not take offence at his doing this, if it is done with an aspect of making a memorandum of details which the writer thinks he might forget. When the conversation is completed and the engagement closed, let the writer read the memorandum aloud and ask, "Have I put everything down aright?"—"All right" is the answer. Let him keep his memorandum. It is not of any important legal effect, for the other person has not signed it. But it will practically be as useful as a lease in settling differences of recollection. When the four weeks are at an end, suppose the landlady says that the tenant took the rooms for a month, and asks payment for the two or three days' difference between a month and four weeks. Tenant can produce his memorandum and say, "It was not so. See! here is the note I made at the time. Do you not remember that I wrote this while we were talking, and read it over to you, and that you said it was 'all right?' Well, it says 'Rooms taken for four weeks.'"

Very few persons will insist upon their own recollection of a conversation weeks or months old against a memorandum which was made and shown to them at the time.

Very probably it is not the rule, when a whole house is leased, that the landlord is responsible for its being of suitable character and condition for a dwelling; there is much reason for considering that the tenant, who alone knows how he wishes to use the building, will satisfy himself, at least as far as prudent inquiry can ascertain, that the building he selects is suitable for his purpose. The rule as to apartments is more favorable to tenants. Keeping the rooms neat after the family move in devolves, of course, upon them; but they are entitled when they come to find their new quarters in a reasonably good condition for an abode. The courts consider that persons who hire rooms for dwelling do so upon an understanding that the rooms are in a state fitting them for comfortable and decent habitation; and if this is not the case, the tenant has a right to withdraw. As far as outward condition goes, tenants should judge for themselves. If they have a reasonable opportunity when they engage the apartment to inspect it, they ought not to complain afterwards of what they saw and did not disapprove when they made the bargain. The important application of the rule is to matters concealed and invisible, or to cases where the rooms are not shown beforehand. In one instance the tenant visited and inspected the tenement, and it appeared to be satisfactory; but, soon after his family took possession, they were taken sick with the small-pox. Upon inquiry, he learned that the previous occupants had suffered with the disease, and had left the wall-paper and other appurtenances infected. He sued the landlord for damages, and recovered nine hundred dollars; for the court said that the landlord was to blame for not giving him information of the facts, and was responsible for the unwholesome condition of the place.\*

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\* *Minor v. Sharon*, 112 *Mass.* 477.

Suppose that one who has engaged rooms which appeared to be in good order should find the bedstead which he hired for exclusive use preoccupied, and should suffer from "the pestilence which walketh in darkness;" what are his rights? The case does not appear to have arisen in American jurisprudence; and resort to foreign systems is needed for deciding it. The rule of the civil law may very probably have been *De minimis non curat lex*—the law does not cure the little things; also, *Caveat emptor*—see that what you buy (or hire) is empty! If so, the tenant would be obliged to abide by his bargain. But the rule of the English law, which doubtless would be followed in this country, is favorable to tenants; for it has been gravely decided in behalf of persons of no less note than Sir Thomas and Lady Marrable, who took a furnished house at Brighton for the season, but removed in three days, in consequence of Lady Marrable's dissatisfaction with the sleeping-furniture in this respect, that a serious complaint of this kind is just cause entitling a tenant of furnished rooms to cancel his agreement.\*—There was a New York city case in which the apartments were in good order when the tenant came, but became unfit for a residence by overflow of unwholesome water from waste and sewer pipes. The landlord supposed he could leave the duty and expense of repairing these pipes to the occupants; but this tenant would not make the repairs, and removed. The landlord then sued him for rent; but the court decided against the claim, saying that a lessee of an entire house may be obliged to provide for his own comfort in it, but a landlord who lets a house in apartments must be considered bound to maintain the sewer-pipes and drainage fixtures in proper repair for use, because they pertain to the whole building, and no one tenant can be required to keep them in order for the others.†—There was a singular

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\* *Smith v. Marrable*, 11 *Mees. & W.* 5.

† *Fash v. Kavanagh*, 24 *How. Pr.* 347.



English case in which the landlord, apparently for the purpose of inducing a disagreeable lodger to remove, cut the bell-wire, darkened the skylight, and daubed the stairway and banisters. But the unpopular tenant remained, and sued the landlord for damages. He recovered fifty pounds. The landlord contended that he did not let his bell and skylight and stairs; nothing was said about them; the lodger only hired the room. But the court said that lodgers are entitled to the benefit of all these general conveniences of the whole building without any express bargain.\*

Quite a number of lawsuits have arisen where the occupants of one suite have suffered from defects in, or mismanagement of, fixtures in another. Suppose, for example, that water up-stairs overflows and floods the lower rooms; or that a person going to an upper floor falls through a hoistway which stands open and unguarded on a floor below. Upon this subject the doctrine is that the owner of the building is responsible for the strength, sufficiency, and original good condition of the fixtures; but the various tenants are answerable for the manner in which they and their families and servants use the fixtures. Thus if the water-pipes were old and weak, and burst because they were worn out, or the hoistway casualty occurred because there was no proper door or fence, the owner of the building is the person responsible. But if the cause of the disaster was that the family above left the water running, or that the occupants below neglected to shut the hoistway when they had done using it, they, and not the landlord, are to be sued. To claim damages from either, the person sued must be shown to have been in fault. The owner is not liable for such casualties merely because he owns the building, but only in case he has broken some agreement, or failed to perform some duty. Where a boiler in a range exploded and blew the family of the tenant

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\* *Underwood v. Burrows*, 7 *Carr. & P.* 26.

about the kitchen, but the cause of the explosion was a defect in the apparatus of which the owner never had any knowledge, the New York Court of Appeals decided that he was not chargeable.\*—A rusty fire-escape in a Brooklyn tenement-house led to an instructive decision. The father of a family hired the rooms without observing that the fire-escape had become so rusted as to be weak and insecure. His son, about ten years old, went out upon the fire-escape, from curiosity apparently—there was no alarm of fire—when it broke, and he fell and was killed. The lower court held that the owner was liable, because he was in fault; the law required him to maintain a safe fire-escape, and he was to blame for allowing it to become decayed. But the Court of Appeals reversed this judgment. They said that it is very true that the owner of a tenement building, not the tenants in it, is bound to keep the fire-escape in good order; he is, however, not bound to keep it in order for children to play upon it, but only for its proper use as a fire-escape, and in case of an alarm. The tenant had no legal claim to have his son go out upon the apparatus for mere amusement or curiosity, and when the child did so, he went at his own risk.†

Noise, disorder, and misconduct by the occupants of one flat or tenement do not entitle those of another one who may be incommoded, to remove. They may have some redress against the offending persons, but they do not have a just cause of complaint against the landlord. If the owner has let the rooms in good faith, he is not responsible for the behavior of the tenants; at least, he is not responsible to the other tenants. The quiet family must pay their rent, notwithstanding the inconvenience. Such, at least, has been the decision in one case.‡—But in an instance where the landlord himself lived in a portion of the house,

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\* *Jaffe v. Harteau*, 56 *N. Y.* 398.

† *McAlpin v. Powell*, 1 *Abb. N. Cas.* 427; 70 *N. Y.* 128.

‡ *Gilhooly v. Washington*, 3 *Sandf.* 330; 4 *N. Y.* 227.

and he habitually brought noisy people home with him, who sang and danced and made disturbance in the landlord's rooms through the night, so that the tenants could not sleep, and for that reason they moved away, the court said that the landlord was in fault, and must lose his rent; his causing an intolerable noise was the same thing in law as expelling the tenants.\*

Thus a lodger's claim against his landlord for injury or inconvenience sustained during the hiring depends chiefly upon the question whether the landlord is in fault.

#### BUYING FURNITURE ON INSTALMENTS.

Upon the "instalment" plan, which has lately come into extensive practice in cities, a dealer proffers to supply customers with an outfit for housekeeping, or a musical instrument, or the like, and to take pay in weekly or monthly sums. This arrangement accommodates those who cannot pay cash for all they want to buy, and doubtless often enables the dealer to sell more things and get a higher price than he can in dealing with cash customers. The usage is for the dealer to exact a written contract that the buyer will pay the instalments of the price on set days; that the goods shall remain the seller's property until full payment; and that if the customer fails with any instalment, the sums already paid shall be forfeited, and the dealer may demand his articles. But dealers are finding that the courts will not enforce these stipulations to a degree which works real injustice. There is a doctrine that contracts may be so oppressive that the courts will decline to assist the creditor. The picture drawn in the Merchant of Venice of Portia meeting Shylock's demand for the pound of flesh promised in the bond with the threat of punishment if he should, in cutting it, shed one drop of Christian blood is paralleled by many actual decisions of real courts in cases where extravagant contracts have been presented. Ancient-

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\* *Dyett v. Pendleton*, 8 Cow. 727.



ly there was complaint that money-lenders would require from a borrower a bond promising that if he did not repay the money upon the day named, he would submit to pay twice as much by way of penalty. And when bonds first came into use, the law-courts considered that they must compel the borrower to pay the full penalty—the double sum—if he fell behind in time. But the borrowers complained to the kings, the kings sent them to the chancellors, and the chancellors examined the subject, and decided that collecting double the debt for a little delay in payment was a gross oppression and injustice. So they established a practice of notifying any money-lender who sued for the whole penalty of his bond that he must be content with recovering his debt and interest; if he exacted more, the chancellor would send him to jail. The courts of law gradually adopted this view, and the result is, although a bond always reads that the borrower shall pay double if he fails to pay punctually, yet he never can be made to pay more than the debt and interest. All this is merely Antonio, Shylock, and Portia in real life. The story, in the arithmetics, of the man who bought a horse for the sum of one farthing for the first nail in his shoes, two farthings for the second, four for the third, and so onward in geometrical progression, is a good example of an unconscionable bargain such as courts will not enforce. There is a tradition that a crafty horse-dealer in England, a century or so ago, did actually inveigle a customer into this contract, and sued him for the impossible sum. Real or imaginary, the case is often given in the law-books as an illustration.—A more recent instance is also narrated where a man hired a canvas awning, and promised to pay a dollar a day rent for it. By some oversight he neglected to return it, and, after perhaps a year had passed, the owner sued him for three hundred and sixty-five dollars, being the sum due by the agreement. But the awning was not worth fifty dollars, and the court said it was absurd to render such a bill upon pretence of a contract to pay a dollar a day; that the awning-owner

might have a judgment for the value of his awning, as if he had sold it. Such extravagant agreements are not enforced in modern courts.—So in regard to forfeiting furniture, and all sums paid towards the price, for failure to pay one of the last instalments on the very day agreed. In the winter of 1879 two cases were observed in the New York police-court reports. The story in one was of a woman who had bought a looking-glass for sixteen dollars, upon instalments of three dollars a week; she had paid thirteen dollars, but could not pay the last three dollars on the day named. In the other a married couple had bought forty-two dollars and fifty cents' worth of furniture, and had paid instalments up to thirty dollars; then the husband's wages failed and the payments fell into arrears. The dealers sent for the furniture; but the woman complained to the police-justices, and the justices explained that they did not consider such forfeitures enforceable, and that if the merchants did not return the furniture, they would be chargeable with stealing. No doubt, thousands of cases have occurred in which buyers have submitted to lose property for which they had partly paid, and their money also, not knowing that they had any redress. The merchant, in reclaiming the goods, seems to be acting according to the letter of the contract; but it is far from being established that he has the law upon his side.

These stringent stipulations are valid and enforceable in some aspects: they may serve an important purpose in protecting the dealer against fraud by the customer. In Kansas an organ-dealer sold an organ upon the instalment plan, and the buyer surreptitiously moved it away from where he had agreed to keep it. The organ-dealer went for it, and showed his contract that it was to remain his until paid for. The court said that it did not belong to the buyer to move about, and the seller could reclaim it.\* A seller is not bound to enter into lawsuit for his money

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\* Hall v. Draper, 20 Kan. 137.



in such cases, but may follow his property. Within limits, that is, he may; for if a liquor-dealer should buy a stock of whiskey on the instalment plan, it is very evident that the law cannot follow the whiskey down his customers' throats, but must consider it as becoming the barkeeper's property, the same as if he had bought it outright. Moreover, where the buyer of the furniture becomes so badly in debt that his creditors seize what they find in his house, the instalment plan protects the merchant. —A New York sheriff had an execution to collect, and went to the debtor's place, where he found a fine piano, which he seized and was going to sell. But a music-dealer objected; he said that the piano belonged to him, and he had sent it to the debtor for sale on the condition that it should continue to belong to the dealer until all the instalments were paid. The court said that was a valid condition, and the music-dealer's piano must not be sold to pay the agent's debts.\*

These, however, are quite different principles from enforcing the stipulation for the purpose of enabling the dealer to defraud or oppress the customer. In a pianoforte case in Michigan, the court said that if an instalment dealer wants his goods back, he must repay the instalments he has received, deducting a fair sum for use and wear of the articles.† And there is little doubt that if the buyer wished to keep the things, instead of having his money back and surrendering them, the courts would, upon a proper suit brought, protect him from any grievous hardship by allowing him to make his final payments, adding interest after the contract day.

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\* *Cole v. Mann*, 3 *Thomp. & Co.* 380; 62 *N. Y.* 1; *Boon v. Moss*, 70 *N. Y.* 466, which has been claimed as sustaining the instalment dealers in their exaction, was a case of the same kind.

† *Preston v. Whitney*, 23 *Mich.* 260. See, also, *Howe Machine Co. v. Willie*, 85 *Ill.* 333; *Latham v. Sumner*, 89 *Ill.* 233.



## CHAPTER XXXII.

## PHOTOGRAPHS.

COURTS and lawyers are now putting photographs to novel uses. Sun-pictures of various kinds have been in popular use for a generation ; but many years passed before they were adopted into the apparatus of courts of justice. The law of the land is a wary old fox, and scrutinizes a new invention for a long time before extending the paw to appropriate it. But of late years, when a person is to be identified, the judge and jury are very glad to bring in the aid of photographs. In such lawsuits as the great Tichborne trial, where a man claims to be a person who left the country years ago, and has not since been seen at home, if there are photographs of that person taken before he went, they may be of the greatest use in determining the identity of the claimant. Every one has heard of the Rogues' Galleries, in which the police keep photographs of noted criminals. If a thief or vagrant, newly arrested, is suspected to be an old offender, he is taken to the gallery and confronted with the portrait. A photograph is an important auxiliary in the still-hunt for a defaulter. If a bank cashier or insurance secretary has absconded with money enough in his possession to warrant incurring the cost, detectives will quietly circulate copies of his photograph. Experts can usually form some judgment of the course of his journey, and a thousand dollars will put a cheap portrait and notice of reward into the hands of railway conductors and brakemen, hotel-clerks, hall-boys and porters, postmasters, baggage expressmen, newsvenders, keepers of saloons and restaurants, and all that multitude of alert, sharp-sighted, quick-witted men who watch the movements of travellers. The photographs, unsus-

pected by him, follow him; and he can hardly buy a newspaper, a meal, or a drink, go in and out at his hotel, or call at the express or post office, but some one is stealthily comparing the face of the stranger with the visage upon the card. This gives the detective police of our day an aid of which Bow Street officers and the old-time policemen of New York never dreamed.

Photographs are even of service when the man to be identified is dead and buried. Probably the well-known case of the murder of Goss in Pennsylvania would never have been unravelled if there had not been a photograph.\* The plot was a very crafty one. Udderzook and Goss united in a scheme to obtain money from a life-insurance company by insuring Goss's life, and then pretending he had died. The idea which Goss had was that he would conceal himself, while Udderzook collected the insurance money, and then the two would divide it. But Udderzook's plan was to kill Goss while he should be in concealment, and to keep the whole sum himself. He anticipated that, as Goss was to co-operate in making every one believe he was dead, there would be no further inquiry for him when he should be afterwards murdered. The two obtained a policy, and, soon afterwards, set the painter's shop of Goss on fire. It was burned to the ground, and Udderzook produced from the ruins what he declared were the half-burned remains of Goss; though in truth they were those of some unknown person, procured for the purpose of deceiving the company. He then proceeded to claim the insurance. Meantime Goss, adopting the false name of Wilson, travelled away, to conceal himself as agreed. Udderzook soon rejoined him, enticed him into lonely woods, and killed him. But it happened that the insurance agent, at the time when the policy was obtained, became somewhat intimate with Goss, and the two went to a photographer and had their portraits taken on one card. When the suspicion arose that the man found mur-

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\* *Udderzook v. Commonwealth*, 76 Pa. St. 340.

dered in the woods, and who had called himself Wilson, was really Goss, the police carried the photograph along the route of the Udderzook and Wilson journey, and showed it to people wherever the two had stopped; and they all said, "The man standing by the insurance agent is the man who called himself Wilson." Thus the whole plot was exposed. Udderzook was tried for murder, and by the aid of the photograph was convicted. —There was a somewhat similar case, less familiar, of an Englishman who left wife and home in Canada to visit Alabama. He had not been there long when he became involved in some controversy, was arrested by the sheriff, and was then taken from the jail by an angry mob and killed. His widow brought—as by the law of Alabama she might—a suit against the county for her loss of support. But her husband had been in Alabama for only a short time, and had gone by two names; hence, when the county authorities challenged her lawyer to make proof that the husband from Canada and the man killed by the mob were the same person, he was perplexed. The man, meantime, had been buried, and there was no person who had known him in both Canada and Alabama. Fortunately for the widow, her husband had sent to her from Alabama his photograph, with his name upon it in his own handwriting. Upon the trial she produced the card and testified to the likeness and the autograph. The picture was then shown to the sheriff, and he said it was the portrait of the man whom he arrested, and whom the mob took from him. And persons concerned in the burial declared it was the man who was killed. Thus the case was won.\*

A photograph of a building or of a locality may be very useful. Suppose a traveller along a country road, by night, drives against a heap of stones or pile of rubbish, wrongfully left in the way, and is hurt. He desires to sue the town for damages; but, of course, the highway officers will send and remove the nui-

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\* *Luke v. Calhoun County*, 52 *Ala.* 115.



sance, and after that it will be difficult for the jury to understand fully the obstruction. Let him have it photographed.—A New-Yorker, when his next-door neighbor, in altering his own building, tore down the wall between them, did not wish to let the mischief lie unrepaired until his lawsuit could be tried, so he had careful photographs taken. Then he repaired his place. When the suit for damages came for trial, his lawyer asked to show these pictures to the jury, and the court said he might do so.\*—In Iowa, a railway bridge broke down under a train, and the conductor was killed. His widow knew that the company would have the bridge mended long before she could have a trial, and that, after it was mended, there would be great difficulty in showing how defective it was. She had photographs taken of the wrecked bridge; and by aid of these she gained her suit.†

In questions of handwriting and the genuineness of signatures, photography has been several times invoked. A photographic copy of handwriting can be taken enlarged, which increases, so the friends of such evidence claim, the means of detecting differences or asserting identity between two specimens. The effect is much the same, so one judge observed, as looking at a manuscript through a microscope, which has long been considered proper. But courts have differed as to the propriety of using photography to determine the genuineness of papers where forgery is in question. The Taylor will case in New York, the Howland will case in Massachusetts, and the Rosa land-grant case in the Supreme Court are notable instances of the discussion of this question. In a less-known trial, where a bank teller denied that he had certified a check, and experts differed as to whether the certificate was forged, the judge allowed a photographer to come into the court-room with a lantern and throw

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\* *Cozzens v. Higgins*, 1 *Abb. App. Dec.* 451.

† *Locke v. S. C. & P. R. Co.*, 46 *Iowa*, 109.

a magnified picture from a photographic negative of the check upon the wall for the jury to see. Perhaps the most singular case of this kind was one where the question was which of two yeast-powders or "self-raising" flours would make the best bread. Instead of bringing to the judge specimen biscuits to try, the lawyers had photographs (magnified) taken of sections of loaves, and they showed the judge these pictures.\*—Where the question is of preserving or using copies of undisputed papers, photographs are serviceable. In one instance, a party asked the court to send a document abroad for witnesses to see and swear to; and the judge said that this might be done if applicant would first have it photographed, so that if it were lost, the court could use the copy.†—In another instance, a party needed to produce some state-papers from the War Department at Washington; but the officers would not allow him to take them away, so he had photographic copies taken, and the judge said they would answer every purpose.‡

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\* 1 *Whart. Evid.* § 676; 4 *Am. Law Rev.* 625; 20 *Alb. Law*, 4.

† *Daly v. Maguire*, 6 *Blatchf.* 137.

‡ *Leathers v. Salvor Wrecking, &c., Co.*, 2 *Woods*, 680.

## CHAPTER XXXIII.

## FIREARMS AND FIREWORKS.

So many calamities and fatal accidents arise from careless use of gunpowder that the legal responsibility for those who use or misuse firearms or fireworks has been steadily growing more strict.

## THE RIGHT TO BEAR ARMS.

There is an important distinction between firearms and fireworks. Some general knowledge of firearms is important to the public welfare; because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war. The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right. No doubt, a person whose residence or duties involve peculiar peril may keep a pistol for prudent self-defence. But these are very different habits from keeping pistols for playthings; carrying them carelessly in the pocket; toying with them at picnics, on board steamers, and in saloons; exhibiting them to curious girls; lending them to boys; firing at random with them upon city sidewalks. These are practices upon which every good citizen will frown, and which the law of the land is every year more explicitly discouraging. For grown men to use pistols as playthings should be everywhere rebuked. They should be firmly refused to children. Carrying them for defence, in the more settled parts of the land, savors of cowardice rather than of prudence; a well-behaved man has less to fear



from violence than from the blunders of himself and friends in managing the pistol he might carry as a protection. And the grounds on which the right to keep and practise with weapons of war is protected lend no support whatever to an indiscriminate use of fireworks for amusement. These are restricted, and may be even prohibited altogether by the authorities. If allowed, they are merely tolerated; and the users are held to a strict responsibility.

As to guns and pistols, then, the citizen who practises with them is in the exercise of a constitutional right; and to mulct him for any unfortunate consequences, proof is needed that he was careless. He must exercise due care to avoid doing mischief. *Sic utere tuo ut alienum non lædas*—use your gun so as not to hurt another man—is a time-honored maxim. In July, 1866, the pleasure yacht *Rambler*, as she came to anchor at her rendezvous in the Hudson portion of the harbor, fired the customary salute of one gun to the other vessels of the yacht squadron. The wadding struck a passenger upon a Hoboken ferry-boat passing near, knocking him down and breaking his arm, rendering it useless for life. He sued the owner of the *Rambler*. The latter escaped judgment upon the ground that he was not in any manner in fault. He was not on board, did not authorize the firing, and had given general orders that the yacht's gun should not be fired without directions from him. It was the master of the yacht who directed the salute. The court said that under these circumstances the owner was not liable. He had done all in his power. It was no necessary part of the business of navigating the yacht, for which the master was hired, to fire complimentary salutes; if he did so, he acted on his own responsibility, and he, if anybody, was the proper person to pay damages.\*—The Colonel of a New York regiment was less fortunate in a suit brought against him. This case occurred in

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\* *Haack v. Fearing*, 5 *Robt.* 528.

July, 1855. The regiment was in camp near Kingston, and, in the early morning, practised target-firing, using, of course, ball-cartridges; and some few of the guns were not discharged. The Colonel ordered these taken to the rear and unloaded, which was supposed to have been done. One rifle, however, was overlooked. In the afternoon, the men were paraded for some exercises involving firing with blank-cartridges. When the Colonel gave the word "fire!" the regiment was fronting a crowd of spectators, who supposed themselves in perfect safety, as only blank-cartridges were to be used. But the ball from the gun remaining loaded killed a child in its mother's arms, also breaking the mother's arm. The jury found a verdict of \$1500 against the Colonel, and it was sustained. The Colonel argued that he ordered the firing in the performance of a public duty as a military officer training his men, and was not liable. But the court said that such use of firearms requires a very high degree of care to avoid injury; and unless he could show that he had given all proper orders, and taken precautions to have them faithfully obeyed, and that the injury was done in violation of his judicious orders, he was chargeable.\* The case would have been differently decided, doubtless, if the woman had been in any respect careless.—In Indiana, a man lent his gun to four boys, who, when they had done with it, loaded it up heavily and returned it to the owner. This was done as a trick, and to have him hurt by the recoil when he discharged the gun next time. He did fire it, and was hurt, and then sued the boys. But they proved that he had suspected the trick, and tested the loading before he fired, and knew it was overloaded with six inches of charge. The judges said he had no business to fire the gun, and must bear the consequences himself, as they were partly his own fault.† One has a general right to practise with firearms; but the least

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\* *Castle v. Duryee*, 1 *Abb. App. Dec.* 327; 32 *Barb.* 480.

† *Smith v. Thomas*, 23 *Ind.* 69.

carelessness exposes him to pay for all injury done. And, no doubt, whoever amuses himself with firearms on the Fourth of July or any other day, in crowded streets and public places, is liable for any injury that is caused, except where the injured person is in fault.

#### DISPLAY FIREWORKS.

The rule relative to all mere display fireworks is probably stricter than that which applies to firearms, properly so called. To secure the training of the people in the use of weapons, the Constitution declares that individuals may keep them; hence, to obtain damages for an injury from a gun or pistol, one must show some impropriety in time, place, or manner of using it. There is no such right as to rockets, squibs, and crackers; and as they are necessarily dangerous things, one who uses them for amusement should be held—except, perhaps, where he keeps fully within his own land—liable, irrespective of any carelessness. He takes the risk.

Thus, with respect to rockets, there was a case in Boston at a time when a Grant Club organized a torch-light procession. The plan was that, as the procession passed along the street, the residents who sympathized with the club in politics should greet it with various fireworks. Mr. Fisk and his son George were in the vestibule of their house letting off Roman candles; and Mr. Wait, directly opposite, was firing rockets, and one of these rockets, instead of taking course upward, flew across the street and put out George's eye. Mr. Wait's lawyer argued that he could not be charged, because he and Fisk were both members of the Grant Club, and had united in getting up the celebration, and so it was a joint affair, and Fisk was in fault as well as Wait. But the court said that had nothing to do with Wait's carelessness in aiming rockets across the street, when the plain rule for rockets is *sic itur ad astra*. And the jury awarded \$2000.\*

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\* Fisk v. Wait, 104 Mass. 71.



It seems strange there have not been lawsuits by persons injured by the fall of rocket-sticks, but we do not remember that any such case has been before the courts.

As to fire-crackers, it was upon the Fourth of July, 1857, that a man was driving his horse and wagon through a Poughkeepsie street, when a patriot, aged fourteen, threw a lighted cracker under the horse. Its explosion frightened the horse, which dropped dead. Lawsuit; in which the lawyers argued that the wagon-driver knew that Poughkeepsie boys were accustomed to fire these crackers on the Fourth, and he had no business to be driving through their streets; also, that the horse had heart-disease, and died of that, not of the cracker at all; also, that he was so old he would have died very soon anyway. But the owner recovered his damages. And the court said that the whole business of exploding crackers in the streets on the Fourth or any other day is unlawful.\* Mere custom cannot justify it. The crackers are tolerated, but not authorized; and whoever fires them to the injury of travellers acts at his peril, and is liable for all the damage he causes.

#### CARRYING CONCEALED WEAPONS.

One token of progress towards a restricted use of firearms is seen in the laws which now prevail in most of the States against carrying concealed weapons. It was formerly claimed that because a man has a right to own a pistol he might carry it in any manner he pleased. But the legislatures interposed by saying, "Carry a pistol if you please, but you shall carry it openly. Hang it in a belt, or hold it in your hand, or keep it in sight so that people can see you go armed, and keep out of your way accordingly. You shall not hide it in a pocket or carpet-bag." And the courts have sustained laws like these, for they do not interfere with the substantial right of self-defence. Another ex-

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\* *Conklin v. Thompson*, 29 Barb. 218.

ample of this progress is in decisions that the constitutional right is limited to correspond with its purpose—the cultivating an ability of armed defence—and does not extend to toy and petty weapons. The meaning is that the citizen has the right to keep and bear such weapons as are used in civilized warfare. The little pistols that are sold and carried so much for the mere amusement of the lad of the period probably have no constitutional protection.

“I DID NOT THINK IT WAS LOADED.”

Another aspect of this matter is seen in various decisions in recent years subjecting persons to severe responsibility for annoying others with unloaded pistols. It was considered in former times that if the pistol was not loaded, no offence was committed in aiming it at a bystander, for by no possibility could it do harm. And the every-day excuse for what is called an accidental shooting is, “I did not think it was loaded.” But now many courts hold this no excuse. It is lawless and criminal behavior to brandish a gun or pistol at another person, whether the weapon is loaded or not. For the act must be considered from his point of view. If one sees a pistol aimed at himself, the annoyance, insult, or sense of alarm, or provocation may be just as great, although it is not loaded, if he does not assuredly know it is not. What if it be not loaded? What great difference does that make, after all? The one who holds the butt may know that the barrel is innocuous; but what can the one who fronts the muzzle know as to the fact? Why, then, should it be thought a trivial matter to point even unloaded firearms at one’s friends and neighbors? It ought to be universally understood and realized that threatening a person with even an unloaded weapon, or making believe to shoot with a pistol which has no charge, is a rude, unmannerly, disgraceful act. It is often as likely to give alarm as if the weapon were really *loaded*; and the feelings of the person threatened are the true

test of the mischief done, not the belief or supposition of the actor.

The story narrated by the complainant in a North Carolina case was this. He was approaching church one Sunday morning, and saw a group of people at the door. One of these—coincidentally named Church, by-the-way—called to him to go back. He refused to go back. Church then stood up and said, "I have a pistol," and placed his hand on a pistol that was belted around him. Then the complainant began to walk back. Church followed him, saying he would shoot him; and as he walked, he drew the pistol, but did not cock it or aim it. The court held that Church was punishable. Drawing his pistol and threatening to shoot was an offer of violence, and constituted an assault, and the fact that the pistol was not cocked made no difference.\*

In an Iowa case, a man accompanied by a dog was crossing a neighbor's field where sheep were pastured, when the dog attacked and bit some of the sheep. This angered the sheep-owner (upon whom the report humorously bestows the name Shepard); and he came forward with his gun, and attempted to shoot the dog. The owner of the dog expostulated, saying, "Don't shoot my dog. I will pay for any damage he has done." But Shepard shot the dog. Then there was a prolonged controversy. At last Shepard pointed the gun at the owner of the dog, and threatened to shoot him. For this he was brought to trial. He argued that there was no offence, for the gun, which was an old-fashioned single-barrelled one, had just been fired at the dog, and had not been reloaded. It could not possibly have been discharged. But the court adjudged it an assault; for, they said, the offence of aiming a gun at another is to be determined by the apprehension of the person at whom it is aimed, not by the intent of the offender.†

About six years ago, a quarrelsome fellow named White,

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\* *State v. Church*, 63 *N. C.* 15.

† *State v. Shepard*, 10 *Iowa*, 128.



driving in his wagon along the highway, came to a spot where several men were mending the road. One of these, Sullivan, asked White to drive in the middle of the road. White answered rudely, and Sullivan inquired, pointedly, what he meant. Then White took up a gun which he had in the wagon, and aimed it at Sullivan, and then at another of the workmen, Harrington, and said, "I have got something here that will pick the eyes of you." White was tried for this. It was proved that Harrington believed for the moment that White would shoot, and was alarmed. The judge told the jury that if White, within shooting distance, menacingly pointed a gun at Harrington, which Harrington had reasonable cause to believe was loaded, and if he were in fact alarmed, and with good reason, there was a criminal assault, whether the gun were in fact loaded or not.\*

Once upon a time, in Texas, Flournoy was drinking in Grace's bar-room. He became drunk, excited, and abusive. Grace tried to quiet him. He drew a pistol, which a bystander pulled away from him. "Why," said he, "it isn't loaded!" And it had no cap upon it. Flournoy was tried for an assault with a deadly weapon. His lawyer argued that an unloaded pistol, without a cap, is not a deadly weapon. But the judge left that question to the jury, who found Flournoy guilty, and he was fined \$150. The Supreme Court approved this, and said, "If juries would generally impose more exemplary punishment for offences of this character, reckless men would feel the necessity of more self-restraint, and offences committed by violence would be less frequent."†

There have been other decisions of the courts to the same general effect. They show that courts regard aiming guns and pistols at people as a rude and lawless act, even if they are not loaded. If done with intent to alarm, it may be a criminal of-

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\* *Commonwealth v. White*, 110 *Mass.* 407.

† *Flournoy v. State*, 16 *Tex.* 31.

fence, and proving that the weapon was not loaded makes no difference. If done in jest, it cannot fail to excite the contempt and reprehension of every right-minded person at the spirit and temper which can find pleasure in such jests.

#### SHOOTING IN SELF-DEFENCE.

Few principles of law are more uncertain and variable in their application to a particular case than the doctrine of self-defence. That there is a right to kill an assailant in defence of one's own life is perfectly well established; and some generalities in regard to it are declared, in about the same terms, year after year in successive law-books. It is agreed that there must be a well-founded apprehension that one's own life is in imminent danger; but the danger need not be real; if it be apparent, so as to convince a cool, reasonable man, this is enough. Thus, if one should be attacked by an enemy who had threatened his life, or by one appearing like a robber on the highway, who should level a pistol at his head with every demonstration of intending to shoot, he might very well believe his life in immediate peril, and be excused for shooting in advance, if he could, notwithstanding the assailant's pistol was not loaded, so that there was not, actually, any danger. The apparent peril would give an excuse. It must be a peril inferred from acts of violence; threats alone, however boisterous or often repeated, do not present a case for killing in self-defence. And the person claiming this defence must be substantially free from blame in the commencement of the affray; one cannot commence a fight and then, when it proceeds to extremity, kill the other and rely on a plea of self-defence, unless the jury, in view of special circumstances, should be more liberal in applying the rule than the law-books are in prescribing it. It used to be said that a person attacked must retreat if possible, and as far as he could—must “back to the wall,” as the old phrase was—before he might exercise the right of self-defence; but this rule has been hacked by so many ex-

ceptions and qualifications that there is not much of it left. Modern trials have proceeded more upon the theory that a peaceable, innocent man, rightfully in the place where he stands, may keep his ground and defend himself against unlawful violence without first retreating. There is, however, an important and clear limitation, that one who has retreated and reached a place of safety cannot arm himself and then return and renew the quarrel, and plead self-defence for afterwards shooting the other. The judiciary naturally incline strongly against persons taking the law into their own hands and settling their quarrels by violence. In the judicial view there is a legal remedy for every wrong, and all persons are expected to avail themselves of it if possible. Only when circumstances absolutely prevent a resort to the law is violence excused. The strong tendency of opinion is that if a man escapes out of a fight, he should apply for legal protection, should have his enemy bound over to keep the peace, and not return better armed and renew the conflict. Juries sometimes view such cases differently from judges. And as the system is to submit the question to the judgment of twelve common-sense men, with general instructions from the judge as to all legal doctrines involved, there is ample opportunity for both the theory of the law and the general conscience of mankind to co-operate in the decision.

The peculiar feature of going into the house to get a gun after an altercation has commenced has actually occurred in several cases, at the South and West particularly. In Tennessee there was a quarrelsome bully named Garret, a drinking man, and known to be of very passionate, dangerous temper when intoxicated, who had an old grudge against Williams, and who had made various threats against that individual in the hearing of third persons, who had informed him of them. One day when Williams was at work for a distiller in the neighborhood, testing or bottling a quantity of brandy, Garret came to the place and began drinking some of the brandy, and picking a quarrel with



Williams. Williams said to his employer, the distiller, "I must leave here, or I shall have a difficulty with Garret." The distiller advised him to go. Accordingly he went to the distiller's house, about a quarter of a mile away, where he had left his gun when he began work. Half an hour afterwards the employer and other workmen went to the house, and Garret went with them, brandishing a pistol. This, however, he put up when he actually reached the house. While he sat on his horse in front of the house, talking with the distiller, Williams came to the door and said, "Garret, you have come for a fuss, and, if you don't mind, you will get it." Garret said, "Let it come." Then Williams stepped back into the house, got his gun, came to the door again, and shot Garret dead. Although there was a good deal of proof that Garret had been for several months previous threatening to kill Williams, and had repeated these threats among the party on the trip to the house at this very time, yet the judges decided that the case could not be called self-defence, because, at the time of the shooting, Williams was not in any immediate danger. He had withdrawn safely from the quarrel in the distillery, and Garret had not done any act at the house to renew the danger. He came out from the front door and discharged his gun, when, to all appearance, he might have stayed inside in safety.\*

In Nevada, Schooley and Smith were drawn into a violent quarrel, arising from Smith charging Schooley with having stolen whiskey from him, which Schooley denied and resented. Smith went into his house and got his gun, cocked it, and advanced upon Schooley, who ran a few rods, as if to escape; but when he came upon a big stick that lay in his way, he picked it up for a club, and returned upon Smith. The latter then lowered his gun, and exclaimed that he "was only fooling." Notwithstanding this, Schooley continued to rush towards him with

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\* Williams v. State, 3 Heisk. 376.

the club. When he came within nine feet of Smith, Smith raised his gun again and fired, and Schooley was killed. The judge decided that this could not be allowed as a case of self-defence. Smith was himself too much in fault, in commencing the violence and precipitating the conflict, to set up that plea.\*

In Alabama, two men quarrelled over a game of cards. One claimed to be winner and the other would not pay. The claimant went away, obtained his gun, and returned with it. As he came back to the spot of the quarrel, the other approached him in a threatening manner, as if, perhaps, he would draw a pistol. The claimant retreated, with his gun presented, saying, "Stand back!" The other cried, "Shoot! I can shoot as quick as you." Upon this the claimant fired his gun, which killed the other player, while the latter drew and discharged a pistol, which, however, did no harm. The judges said that this could not be called self-defence, because the accused, after the first quarrel, went away and returned with his gun to shoot the other player if he refused to do what the accused requested.†

Which person was in fault in commencing the quarrel may sometimes have an important influence in deciding the question of self-defence. An example is in the nearly forgotten shooting of young Austin by Selfridge in State Street, Boston, in 1806. In that instance, a son endeavored to avenge political abuse of his father. The case is noted in the law-books, but their references to it do not disclose the circumstances out of which the shooting arose; these are to be learned from pamphlets of the time, now rare. The city authorities had decided upon a public semi-political dinner for the Fourth of July. The committee, of which Benjamin Austin, the father, was chairman, employed a caterer named Eager to supply the dinner; he did so; the authorities and invited guests ate it, and Chairman Austin then

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\* *State v. Smith*, 10 *Nev.* 106.

† *Lewis v. State*, 51 *Ala.* 1.

disputed the bill. A suit was brought on behalf of Eager, and payment enforced. In this suit Selfridge was Eager's attorney, and some gossip arose to the effect that Eager did not, in the first instance, apply to Selfridge, but that the latter solicited the suit. Benjamin Austin circulated this story pertinaciously and offensively. As rules of professional ethics then very stringently forbade such soliciting, and the two men were prominent in the opposing parties, the charge made Selfridge very indignant. Through a friend, he furnished Austin with proofs, which the latter accepted, that the charge was unfounded; yet Austin would not make a satisfactory acknowledgment. Thereupon Selfridge published in the newspapers a card charging Benjamin Austin with having circulated an infamous falsehood and refusing satisfaction for it, and declaring him a coward, a liar, and a scoundrel. Austin retaliated with a counter-card. The quarrel at this stage was taken up by Charles Austin, a son of Benjamin, upon his father's behalf. He intercepted Selfridge while walking in State Street, and made an attack upon him with a heavy cane; upon which Selfridge drew a pistol and shot him fatally. On trial of Selfridge for murder, the judge told the jury that Selfridge was wholly unjustifiable in publishing the card he did about the elder Austin. To call a man "coward, liar, and scoundrel" in the public papers is not justifiable, as courts view such matters, by any circumstances whatever. But the abuse, bad as it was, could not possibly justify young Austin in making the street attack with the cane. No words, however aggravating, no libel, however scandalous, can authorize a son of the person abused to resort to violence in retaliation or revenge. A son may aid his father, if beaten, and if the assailant is killed the son will be excused; but neither son nor parent can justify resorting to violence to avenge an injury consisting in words, however opprobrious, or writings, however defamatory. Austin's attack being thus legally unjustifiable, Selfridge was acquitted on the ground of self-defence.



Much depends, however, in these cases upon what the jury think of the characters of the two men and of the circumstances of the case. It is only where they have found the accused guilty that the question has come before the bench of judges for decision. There has been, doubtless, a multitude of cases in which the jury have acquitted the accused, and no formal law decision made. It has never been customary to spend any time in arguing about the law of these cases after a jury has rendered an acquittal.

A very remarkable and difficult case involving these principles occurred in 1879 in New Jersey. The details will be generally remembered. The leading facts were: A, being in B's employ as coachman, misbehaved so as to give cause for dismissal. B told him to give up the keys and leave. A met the notice in what was from one point of view turbulent defiance, from another a rightful refusal to leave until his wages should be paid. B, probably meaning no more than to enforce his rights as he understood them, went to the house for a pistol as a means of protection; returned; and, without desiring or threatening to kill A, resumed insisting that A should surrender the keys and depart. But he became satisfied, and with apparent good grounds, from A's acts and demeanor, that the latter intended shooting. To anticipate this and disable A from doing it, he gave what was not intended to be, though it was, a fatal shot with the pistol he had brought from the house. Of course this chain of circumstances presented as one element the returning armed to the conflict. Another element was also involved—the right to eject an unlawful intruder. There is a general understanding that a householder may shoot a burglar. But how far does such a right extend? Can it be asserted towards any one who wrongfully insists upon remaining after he has been rightfully ordered to leave? A customer visits a store, buys goods, and disputes the change offered. A tenant or boarder denies that his month is up. A passenger proffers an insufficient ticket to the conductor,

Either one ought, we will say, to yield in the dispute, leave peaceably at the demand of the rightful owner, and sue at law for the money due him or the damages sustained. But suppose he will not; may he be shot like a burglar, or must the owner, in his turn, keep the peace and seek redress in the courts? Certainly a servant, who has rightfully entered the premises, and is remaining in the assertion of a right, stands on a different footing, even if his claims are not tenable, from a midnight criminal. Probably the limit of the rule would be that a householder has the right gently to expel an intruder, and to use such force as is necessary in doing this.

But in the case described A resisted to the extent of threatening, or preparing to shoot B. The jury probably reduced their view of the facts to something like this: that B supposed, sincerely, that it was right and necessary for him to resume the possession of the barn, which he had temporarily intrusted to A, and that he might meet dangerous resistance in endeavoring to do so; that he armed himself to repel any such danger; and that he fired when he believed that resistance which imperilled his own life was seriously threatened. Accordingly they found a verdict of acquittal on the ground of self-defence.

## CHAPTER XXXIV.

## DOCTORS AND DRUGGISTS.

## CALLING THE DOCTOR.

THE doctor stands at a disadvantage in respect to collecting his bill. He expects to treat a good many patients gratuitously who have not means to pay. The general custom of the profession is liberal in this respect. But it must be vexatious to find, as a physician often does, patients who can pay ready to dispute the bill or procrastinate payment indefinitely.

In some of these instances, the doctor, unable to obtain his fee from his patient, has sued the person who called him. Mr. John Thompson is sitting on his door-step some summer evening, when a runaway carriage dashes up the cross street, and an old lady on the crossing is knocked down and run over. A crowd gathers, and Mr. Thompson steps to the spot to see what has happened. The victim is taken into an adjoining house. The crowd murmurs, "Somebody go for a doctor." Mr. Thompson obligingly goes. Doctor is out. Thompson writes on the slate, "Doctor, please call at No. so-and-so at once. Old lady run over." And signs his name. Doctor reads message, goes, treats the case, cures patient, but gets no pay from her. Then he sends in a bill to Thompson. Thompson remonstrates. Doctor says, "You employed me; I knew nothing of the woman. I went to treat her by your written order. I knew you were reliable, and I charged the visits to you." This is not a common case, but such cases have occurred. It looks like a good legal claim, and Thompson hardly knows what to say, except that he did not understand it so. But it is not according to law. The courts do not consider that a person who



calls the doctor as a messenger only can be charged with the bill.

In old slavery days, in South Carolina, there was a lady who owned a plantation, and employed a "plantation physician" to treat the slaves when ill. One of them needed a surgical operation which the plantation doctor thought was beyond his skill; so he asked the overseer to send for a surgeon. The overseer did so, and a surgeon came and treated the case successfully. Why he did not get his pay from the owner is not known to history. He sued the plantation doctor. But the court said this would not do. There is no understanding that the person who calls in the doctor engages to pay him. To make him pay, some other facts must be shown; such as that he promised in so many words that he would pay the bill.\*—There was a Vermont man who became insane, and his brother carried him to a private asylum, and asked to have him taken care of and treated, which was done. The doctor sued the brother for his bill. But the court said that he must prove that the brother promised that he himself would pay. Without this the doctor's only claim was against the patient and his estate.†—In Pennsylvania there was a young man who became of age, so that his father was no longer responsible for him; but he continued to live in his father's house. At length he fell sick, and the father went for the doctor. Afterwards the doctor sued the father. The court said this was wrong; he should have sued the son; the father went as messenger only; the son, who had the benefit of the service, was the responsible person.‡—Of course, such cases are decided differently where a husband or a father of young children calls the doctor for his wife, son, or daughter. Here the bill is against him, not because he was the messenger, but because he is responsible for the patient's support and expenses. There was a

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\* *Guerard v. Jenkins*, 1 *Strobh.* 171.    † *Smith v. Watson*, 14 *Vt.* 332.

‡ *Boyd v. Sappington*, 4 *Watts*, 247.

Maine lad who ran away from home, so that, legally, his father was not bound to support him; but being sick, he came back, prodigal fashion, and his father received him and went with him to a physician for advice. The boy grew worse and died. The doctor sued the father, who argued that his liability was ended when his son ran away. But the court said receiving him when he returned commenced it anew, and he must pay.\*—A married woman may, if she is ill while her husband is absent from home, send for a physician, and he may charge the husband. There have been two New York cases where a married lady, being sick, has gone to her father's residence, and he has called his physician and has been sued. In one of these the wife went with the husband's approval, in the other the father carried her away secretly. The courts said that the father was not chargeable unless he promised beforehand that he would pay. The husband, or the lady herself, was the responsible person, according as she was justified, or not, in going away from his home. A wife who deserts her husband and becomes sick away from home cannot run up a doctor's or druggist's bill against him; the charge must be against the lady.†

Quite a number of queer cases have arisen where a railway passenger or servant has been hurt by a boiler explosion or collision of trains, and some agent of the company has sent for the doctor, and afterwards the company has refused to pay the bill. Of course, these cases assume that the managers of the train were in some way in fault for the injury, so that the company is liable for the damage done. But the courts say it does not follow that the doctor can render his bill to the company unless the agent who called him had the proper authority. In England the decision is that the "general manager" of a railroad has authority, as matter of course, to call a surgeon or physician when any

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\* *Deane v. Annis*, 14 *Me.* 26.

† *Crane v. Baudouine*, 55 *N. Y.* 256; *Potter v. Virgil*, 67 *Barb.* 578.

one is injured along the route. In this country the same decision has been given, by an Illinois court, of a "general superintendent," who seems to hold a similar position;\* but a New York court decided the question the other way.† As to station agents and conductors, the cases are that the courts will not take it for granted they are authorized to call the doctor. If the doctor comes upon their call and charges the company, he must show that they had leave to send for him.

#### THE DOCTOR'S DUTIES.

The standard of liability for the doctor does not vary with differences between the schools. The courts do not discriminate among the schools as once they did. Formerly, in New York State, there were laws prescribing medical studies, and limiting the right to collect payment for treating patients to persons regularly educated and licensed. But in 1844 this was changed, and the various schools of doctors have since had equal liberty to practise. Homœopathy, in particular, has been quite distinctly and formally recognized before the law. About ten years ago there was a lawsuit to decide whether a Mr. Phillips was mentally capable of making a will. His heirs, who said he was of unsound mind, called for their witness a homœopathic physician named White. The executor then called an allopathist. After he had testified in favor of the will, the lawyer for the heirs asked him if any other physician than himself attended Phillips. The allopathist answered, "No other physician; I understood he had a quack, Dr. White; I would not call him a physician." Lawsuit for slander. The court said that since 1844 both schools of practice have been put on equal legal footing, and it is slander to call a practitioner a quack for no better reason than that he follows the homœopathic system.‡—The *im-*

\* *Cairo, &c., R. R. Co. v. Mahoney*, 82 Ill. 73.

† *Stephenson v. New York & Harlem R. R. Co.*, 2 Duer, 341.

‡ *White v. Carroll*, 42 N. Y. 161.



*presario* Max Maretzek once elicited nearly the same decision from one of the New York city courts. He engaged Signor Corsi as barytone for operas and concerts, putting a stipulation in the contract that Corsi should not be excused from singing, on the ground of sickness, unless he brought a certificate from the doctor whom Maretzek should appoint for the troupe. He then appointed Dr. Quin, who was a homœopathist. Corsi, having a bad cold and sore throat, would not consult Dr. Quin, but proffered a certificate of an allopathist of his own choosing. Maretzek said, "No, thank you," and refused to pay the salary. Then Corsi brought a suit, and argued that a homœopathist was "no doctor;" and so, as Maretzek had not, in Corsi's opinion, appointed any doctor for the troupe, the singers had the right to consult their own physicians. The court said that all the systems of practice had come to be recognized as equal before the law; a practitioner of one school was just as truly "a doctor" as one of another, and the director had the right, since the contract did not name either school, to select the one in which he had the most confidence.\*

Therefore, the doctrine now is that the patient and his friends are understood to employ the physician with reference to their preferring the system he espouses. He has the right to pursue the rules of that system, be it good or bad. His duty is to use ordinary skill and knowledge, such as are possessed by average practitioners of that school; and if he does this, the patient cannot afterwards find fault because some other system would have suited the case better. An Iowa man called a "botanic" doctor to attend his wife, and afterwards sued him for malpractice. There were allopathic doctors, plenty of them, to testify that the Thompsonian had neglected proper and necessary precautions in the case; but he proved that he had faithfully pursued the rules of the botanic system, according to which such precautions

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\* *Corsi v. Maretzek*, 4 *E. D. Smith*, 1.

as the allopathists mentioned were considered improper. The court said that if he had done this, he could not be sued.\*

Doctors deal with powerful and dangerous agents, yet their duty in respect to employing them is not so very severe and strict as one might suppose. Every physician or surgeon must possess and use in each case the average skill and knowledge of good practitioners of his school; if he does this, his duty is discharged. Indeed, in some suits against country doctors, the courts have said that they ought to be judged by the standard of skill common in the country, and are not expected to possess all the experience and resources of practitioners in large cities. An instance of the unfortunate administration of chloroform led to a lawsuit. A man went to a dentist to have teeth extracted under chloroform. He had previously had a severe fall which had rendered him predisposed to paralysis, and not a fit subject for an anæsthetic. The dentist, however, did not know this particular fact. He gave a usual dose of chloroform, but it did not have the usual effect; it made the patient violent instead of putting him to sleep. Then he gave more and more, until at last the patient was made insensible and the teeth were extracted. But the overdose probably caused the paralysis which supervened next day. The patient sued the dentist for malpractice in giving him so much. But the court said a practitioner is not responsible for remote or unknown causes of injury, or for peculiarities in a patient's history or condition which are not told to the doctor. If chloroform is proper and safe to be given ordinarily in such cases, the doctor's duty is discharged.†

The "wall-paper" case has a bearing upon a doctor's duties in time of epidemic. The small-pox was prevalent, and in one house where several patients were sick the attending physician observed that the wall-paper in the sick-rooms had become in-

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\* *Bowman v. Woods*, 1 *Greene*, 441.

† *Bogle v. Winslow*, 5 *Phil. (Pa.)* 138.

fect, and would propagate the contagion. So he caused the paper to be taken off. The landlord of the building sued him for trespass, but the court said it was no trespass, but was doing just right.\*

#### DRUGGISTS' BLUNDERS.

One of the most patriotic and praiseworthy of recent acts of Congress is that transforming all apothecaries and druggists in the District of Columbia into "registered pharmacists." No person within the District may conduct a store for the sale of medicines or poisons unless he is a "registered pharmacist." No one can even dispense medicines upon a prescription unless he either is registered himself, or takes the drugs from the box or bottle under the immediate eye of some one who is. Three Commissioners of Pharmacy are established, and must keep a register, and examine all new beginners in the business; and no one can start a new drug-shop in Washington without four years' preliminary service and a formal admission by these Commissioners to the guild. Pharmacists are declared responsible for the quality of drugs they sell, except those sold in packages as received from manufacturers, and patent medicines—a very suggestive and thoughtful exception. And schedules A and B of the new law contain most exhilarating lists of poisons which must not be sold unless distinctly labelled, and the sale recorded, after the manner long required, and now generally practised, in New York. Thus Congressmen, far from home and unattended, are no longer to be dosed by dangerous decoctions. Lobbyists and chance visitors to the national metropolis find themselves protected against aggravation of the sicknesses incident to the city's situation by unwholesome potions from the shops. Even the resident, destitute of a vote for President, and puzzled, since the Fourteenth Amendment, to read his title clear to citizenship, may rejoice that his soda-water has been taken under the ægis of

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\* *Seavey v. Preble*, 64 *Me.* 120.



Congress, and that, if he will forego advertised pills and potions, and confine himself to the prescriptions of the regular faculty, he will not be poisoned with impunity.

In States where there are not already systematic laws regulating the sale of drugs, those concerned will do well to consult this new local law of Congress as suggesting a very comprehensive system of convenient regulations.\* Registration of members of the trade must depend on positive law; and so must any system of recording sales of poisonous or dangerous drugs. An act of the legislature must be passed to render these things obligatory. Responsibility of druggists for what they sell, and liability for adulteration, can be, and is, measurably well enforced by the courts, independent of any particular statutes. Undoubtedly, druggists, like dealers in provisions and sellers of goods intended and bought for a special use, are under a general implied obligation that what they sell is genuine, commercially pure, and fit for the use designed. If no one is harmed by the inferior quality of a drug retailed, no question is likely to arise, for the price has generally been paid down, and is too small to quarrel over. But where harm has been done, cautionary cases have arisen. A Kentucky druggist kept a mill for grinding drugs, and one day had need to grind some Spanish flies in it for a blister, and did so, not cleaning the mill properly afterwards. Next day a customer brought a prescription calling for Peruvian bark, and the careless apothecary passed the bark through the same mill. It thus became mixed with a modicum of the dust of Spanish flies, and the unfortunate patient was made very sick. He recovered from the dose, however, and he also recovered from the druggist about \$1200 damages for the suffering and peril to which he had been exposed. The court said an apothecary is bound to know what he sells; and if Peruvian bark alone is called for, he must not sell bark mixed with can-

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\* It is the act of June 15, 1878, 20 Stat. at L. 1371.

tharides.\*—This decision does not seem to have fully taught the druggists of Kentucky the responsibilities of their business, for, more recently, one is upon record as having sold croton-oil instead of linseed-oil for a patient, who died in consequence of the mistake, whereupon his widow was adjudged to have a right to full damages.†—And in New York State there is a memorable case where some manufacturing druggists put up belladonna in jars labelled, through mistake, "extract of dandelion." These jars were sold to retailers at random, and one of them, a druggist in Cazenovia, filled a prescription calling for extract of dandelion from this belladonna jar. The patient, a married lady, was nearly killed. As the Cazenovia apothecary acted innocently, he was not prosecuted; but the husband sued the manufacturers, and recovered \$800, which the Court of Appeals approved.‡

A Massachusetts apothecary escaped more easily. He sold sulphide of antimony by mistake for black oxide of manganese. The two look alike, but differ in this, that the preparation of manganese may be safely mixed with chlorate of potassia for very useful purposes; but if the preparation of antimony is mixed with that chlorate, an explosive compound is formed. The buyer, supposing he had manganese, proceeded to mix it with potassia, which was the purpose for which he bought the article. But, it being antimony, the compound which he made exploded, broke his head, damaged his hearing, and destroyed the furniture of his laboratory. Nevertheless, the court held that the druggist who made this mistake was not chargeable with damages, because he did not know that the article he sold was to be mixed with potassia, and did not sell it for that purpose. Kept or used by itself, as he sold it, it would have been innocuous. He was not to blame for the mixing, the real cause of the injury.§

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\* *Fleet v. Hollenkemp*, 13 *B. Mon.* 219.

† *Hansford v. Payne*, 11 *Bush.* 380.

‡ *Thomas v. Winchester*, 6 *N. Y.* 397.

§ *Davidson v. Nichols*, 11 *Allen*, 514.

## CHAPTER XXXV.

## PUBLIC-SCHOOL PUNISHMENTS.

THE question of corporal punishment in the public schools has often been brought before the courts during the last few years. The questions discussed are: Who may be whipped? For what? and, How much? There seems little disposition to question the right.

## AUTHORITY TO CHASTISE.

The decisions appear to assume without discussion that school authorities have the power to chastise refractory pupils. Evidently whipping is not relinquished as a means of school discipline. In some spheres its use is declining. Flogging in the navy appears entirely dead. Flogging as a punishment for crime did seem dead; though lately there are signs of revival. Only woman's-rights orators contend that the law of the present day allows a husband to chastise his wife. Apprentices are not, by modern rules, subject to be beaten by their masters. Four millions of negroes have been emancipated from the lash, and brought under the stimulus of wages. The frequent use of the rod in family government, once deemed a high duty, is now very often doubted and questioned. But there is no dispute, in the courts at least, that whipping is within the lawful authority of public schools. The power seems to be generally considered as a delegation of the parental authority; by sending his child to school the father authorizes necessary punishment. Yet it is not possible to found the broadening system of our public schools wholly upon a theory of parental delegation; especially if "compulsory education" is admissible. The super-



structure is growing larger than that foundation. Discipline in schools embraces somewhat a delegation from the State as well as from the father; it is a police as well as a parental power.

Observe, however, that this power is not necessarily possessed by the teacher as an individual. He is subject to regulations prescribed by the superior school authorities. Thus it is said that the regulations in Boston schools limit a teacher to two blows on the hand with a ratan. Such restrictions are matters into which the courts do not much inquire. The law allows a reasonable moderate chastisement, proportioned to the age and strength of the pupil, the gravity of the offence, and all the circumstances of the case; and refers each instance to the judgment of a jury. In other words, school boards and superintendents may allow teachers to use corporal punishment so far as twelve good citizens, probably former pupils in schools and now fathers of pupils, will say is right and wise.

#### WHO MAY BE WHIPPED.

The candid reader will concur that if a young woman of twenty-one and upwards may lawfully be beaten with a stick as a measure of school discipline, there is no need of further inquiry under this head; the answer must be, "Any one." Yet this is what has been very lately decided. An Iowa girl nearing one-and-twenty entered the public school; but, as it was doubtful whether she would have a right to remain beyond twenty-one, she stated her age as twenty. In a few weeks she attained majority, but the teacher did not know it; she did not celebrate her birthday. Later, he assumed to chastise her. He was prosecuted for assault and battery, and made answer that the blows were given as a moderate and proper punishment in school. The magistrate refused to hear this defence; for he said that the teacher had no authority of the kind over a pupil past twenty-one; the father's right, delegated to the teacher, *had completely expired*. But the Supreme Court decided the

other way. They said that by entering the school and claiming its privileges the young lady impliedly consented to submit to its rules and discipline, and could not complain that she was too old to be punished if she misbehaved; especially as she had understated her age, to enter. And they ordered the magistrate to try the case again and hear the teacher's defence.\* The decision covers the ground that all the pupils in a school, irrespective of age or sex, are subject to such moderate and reasonable correction as their misconduct may render necessary.

#### FOR WHAT.

Upon this question, some important discriminations are made. It is by no means the law that a pupil may be chastised, even moderately, for any kind of disobedience or misconduct. When the Iowa girl's case, just mentioned, came to be tried the second time, her story was that she was in poor health, not able to attend continuously or study hard, and she brought to the teacher a note of excuse from her father, requesting that she might be excused from afternoon school, and also from the algebra class. The teacher would not accept the excuse, and required her to come into the algebra recitation. She did so; but he found fault with her for inattention. She answered back, and then was whipped; but she testified that she did not know whether it was for absence from afternoon school, or for not studying algebra, or for impertinence in answering back. The teacher's account was not materially different from hers, and the Supreme Court decided that he had not made out a defence.† The legal objects of allowing punishment in schools are three—reformation of the pupil, maintenance of correct discipline, and example to others. No punishment can be justified unless it is inflicted for some definite offence, and the pupil is given to know that the punishment is for that offence. Punishment suffered

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\* *State v. Mizner*, 45 *Iowa*, 248.

† *State v. Mizner*, 50 *Iowa*, 145.

in ignorance cannot promote its true objects. Moreover, the father's excuse was a complete protection to the pupil from being whipped for absence or declining algebra. The child cannot be punished in school for obeying its father's commands. If the father restricts the child in attendance or studies, so as to be inconvenient to the school, he may be told he must take the child away, it cannot be allowed to attend unless the full course is taken; but whipping is not allowable. This has been ruled in other cases.—In Wisconsin, a boy's father told him not to study geography, and he refused accordingly. The teacher punished him, and the judges said it was an unlawful assault and battery.\*—The same decision was made in Illinois in favor of a girl who, by direction of her parents, declined to study book-keeping; and the teacher forcibly turned her out of the school-house.†

#### HOW MUCH.

A teacher may use more force in suppressing turbulent misconduct while it is going on than is allowable after it is over and the pupil is called up for punishment. Indeed, putting a stop to misconduct which disturbs the school is not punishment, nor subject to any of its limitations. There have been cases where rude schoolboys have persisted in making chalk-marks on the stove, or in sitting in the master's seat during school-hours, keeping the whole school in confusion, until they were put out of the room by main force. The courts said it was of

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\* *Morrow v. Wood*, 35 *Wis.* 59.

† *Rulison v. Post*, 79 *Ill.* 567. Compare a Massachusetts case, *Spiller v. Woburn*, 12 *Allen*, 127; where the school committee gave order that the school should be opened with Bible-reading and prayer, and that each scholar should bow the head during prayer; and one girl, from a Catholic family, by direction of her father, refused to bow, and for the refusal was expelled. The Supreme Court said that the order, being no more than to require quietness and a respectful attitude while others were engaged in a religious service, and the expulsion, were lawful.



no consequence whether the person who put them out had power to punish; it was lawful to stop the misbehavior.\*—There was a Miss Slocum, whose mother died, and her father married again. Then she herself married, and lived with her husband till he died; after which she returned and boarded with her father. She did not agree with her stepmother, and one day became very abusive. Her father stopped her by force, and put her out of the room; and she complained of assault, because, she being a grown woman, her father had no right to punish her. The court said that had nothing to do with the case; he had the right to stop any person, young or grown, child or stranger, from aspersing and vilifying his wife in his house.†

But after the misconduct is over, and the pupil is to be punished for it as a past act, the general rule is that the teacher must act without anger or malice, and must exercise a reasonable judgment, such as a jury shall approve, in proportioning the punishment to the nature of the offence and the susceptibility or endurance of the pupil. Beyond this the decisions are in confusion, showing how impossible it is to agree on any precise rule. Some forty years ago, in North Carolina, a teacher was complained of for switching a little girl of seven so severely as to raise marks on the flesh, which, however, disappeared in a few days. The court held that raising temporary marks was not abuse; the question was whether the punishment was calculated to produce permanent injury. A teacher had not authority to do permanent injury; but, within that, the manner of punishing was in his discretion.‡ And precisely such a case, in the same State, in 1873, was decided in the same way.—But in the Iowa case already mentioned, the young lady testified she was struck a dozen blows with a hickory rod four feet long and about half

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\* *Peck v. Smith*, 41 *Conn.* 442; *Stevens v. Fassett*, 27 *Me.* 266.

† *Gorman v. State*, 42 *Tex.* 221; *Smith v. Slocum*, 62 *Ill.* 354.

‡ *State v. Alvord*, 68 *N. C.* 322.

an inch in largest diameter, which produced marks and welts that lasted two months. The court held this was an excessive punishment as matter of law. Any punishment which leaves marks on the person of the pupil for two months, or even less, is immoderate.—In a Texas case the complaint was that some unusual and cruel implement was used by a guardian in punishing his ward; and the court said that what instrument was used was not the question; the degree of punishment was the matter to be considered.\*—On the other hand, in Georgia a man was proved to have punished his daughter, ten years old, by slapping her with a hand-saw flatwise; and the court said it was an implement no one but a brute would use; a cruel thing to inflict punishment; unless some extraordinary circumstances were proved to justify using it, even to strike the child "one lick" with it was unlawful.† Thus each case must be decided by its own circumstances. But the authority of teachers is limited, and the rights of children are protected by this general rule, that the punishment must not be more severe than a dozen average fathers of families will say was right.

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\* *Stanfield v. State*, 43 *Tex.* 167.

† *Neal v. State*, 54 *Ga.* 281.

## CHAPTER XXXVI.

## DRAWING ONE'S OWN WILL.

MANY a testator has involved his estate in litigation and expenses, or even frustrated his cherished designs completely, by assuming to draw up his own will. Considering for how long a time wills have been used, how frequent and general are the occasions for them, it seems strange that so many are dubious, insufficient, or unintelligible. Wills are not rare, so that infrequency of use prevents growth of general knowledge. There is scarcely a man or woman who may not be called upon to make a will—not a few persons make and revoke more than one. They are not a new invention about which the public have not had time to learn, but are coeval with our jurisprudence. Wills of personal property were allowed as early as Saxon times in England. Notices of some twenty-five Anglo-Saxon wills are still extant, among them that of King Canute and that of King Alfred. The right to devise lands was established in the reign of Henry VIII. As long ago as the reign of Charles II. in England, the formal requirements of law for the execution of these wills were prescribed substantially as they now exist in all our States. Nor is the law abstruse and difficult of observance. The requirements as to execution are simple, and may easily be obeyed; and the rules of the courts for determining the intention of a testator and carrying it into effect are liberal, and as free as possible from stringent technicalities.

And yet every week exhibits a new case of a testament disputed because not executed as the law requires, or brought into the courts for adjudication because heirs and legatees cannot unite in understanding what the testator intended. Every year



the law reports present many instances of long litigations, eating up an estate by law expenses, arising from blunders or want of foresight and clearness of expression in making a will. Such controversies as the Stewart and Vanderbilt cases, indeed, arise upon grounds against which the best judgment of a testator can hardly be expected to provide, and are fomented by the mere magnitude of the estate involved to a heat and conflict quite disproportionate to any difficulty in legal questions presented. No one can prohibit in advance that his estate shall be claimed by unknown relatives, and the sanest and most self-willed of testators cannot prevent his heirs from contesting his will on the ground of insanity and undue influence. But, aside from these, there is a large class of cases in which long and costly lawsuits might be avoided by reasonable care and attention in the making of the will, and especially by employing competent skilled assistance.

Take the single question of formal execution, and the jurisprudence of this country in the past five or six years will disclose a score of cases in which extended and expensive litigation has been caused by careless blundering. Undoubtedly, very simple and inartistic methods will be sustained if the intent is clear, particularly in States where the statute requirements as to form are less rigorous than in New York. In a California case the following paper has lately been sustained: "Dear Old Nance, —I wish to give you my watch, two shawls, and also \$5000. Your old friend, E. A. Gordon." But a lawsuit was needed to establish it, and probably one or two thousands of the five were exhausted in the process. How is it that so many persons who are thoughtful enough to make a will take so little thought as to how it shall be made?\*

One Ehrenberg, of New Orleans, dated a sheet of paper at its top and wrote below, "Mrs. Sophie Loper is my heiress," and

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\* Clarke v. Ransom, 50 Cal. 595.

he signed his name. Some months later he wrote underneath, "The legatee's name is correctly spelled Loeper." Now the law of Louisiana allows a will which appears in the testator's own handwriting to be valid without any witnesses. Hence the Supreme Court sustained this paper as a valid will. But did Mrs. Loper receive the estate? She obtained what was left of it after paying for a ten years' lawsuit.\*

In a New York case, a John Kelly, some years ago dead, bought, while yet alive and hearty, a printed form of will at a law-stationer's, filled up the blanks with legacies as suited him, and then essayed the proper closing clauses. He wrote: "Likewise, I appoint E. McCarthy to be executor," and here he signed his name. As this seemed not quite the proper thing, he blundered along with further words to complete the will—"Of this my last will," etc.—several lines more, closing without signature. Afterwards he obtained witnesses to sign, and underneath their signatures he wrote, "Subscribed by John Kelly." The result was his name did not appear at all where it should have been placed, at the very end of the will, but popped up insanely in the middle of the clause appointing the executor, and again after the witnesses' names. The will was declared void, and the legatees lost their legacies.†

Henry Catlett, in Missouri, was even less fortunate. He sent a message to a lawyer to draft a will for him, which the lawyer did, putting the name in the heading in the usual form. Catlett read the paper, expressed himself satisfied with it, and asked witnesses to sign it. They did so, but he himself did not. The somewhat desirable ceremony of the testator's signing was omitted altogether. Notwithstanding this neglect, the Probate Court accepted the paper for a will, thinking the name in the heading or title was enough of a signature. But the heirs-at-law carried

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\* Succession of Ehrenberg, 21 *La. Ann.* 280.

† Sisters of Charity v. Kelly, 67 *N. Y.* 409.

the case to the Supreme Court, which reversed the favorable decision, and threw the estate into intestacy. They said the name must be written by the man himself to be his signature. If Catlett had written the heading, it might have answered; but not when his lawyer wrote it for him.\*

In two or three recent cases a lawsuit has arisen because the paper offered bore no title or peculiar phrases such as are usually esteemed appropriate to wills, but read like a deed. It commenced, "Know all men by these presents," and ended, "In witness whereof I have set my hand and seal." Such a paper, if never delivered, but found among the papers of the signer, after his death, cannot operate as a deed. When, however, the courts have been able to see that it was intended for a will, they have sustained it.† Yet why leave one's estate in a lawsuit for want of writing in the paper that it is a will?

A testator in West Virginia, who had made a formal and proper will, could think of nothing better to do than to accompany it with a sealed letter to his executors, containing further suggestions as to the disposal of his property. Of course, some one was found to raise a question whether this letter did not revoke or modify the will; and this question came to be one of the elements in a seven years' lawsuit.‡

Years before he died, Samuel Rodgers, of Tennessee, made his own will in due form. He was a lawyer, was at one time chancellor, and might have known about wills. He left his property among three brothers, and the children of a fourth brother, deceased. The civil war arose. Samuel continued a staunch Union man, while these children of the fourth brother sided with secession. This greatly displeased their uncle, and he often said they should have none of his property. In his last

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\* *Catlett v. Catlett*, 55 Mo. 330.

† See *Bright v. Adams*, 51 Ga. 239; *Re Diez*, 50 N. Y. 88.

‡ *Lucas v. Brooks*, 18 Wall. 436.



sickness, he called his three living brothers around his bedside, directed them how he wished certain property disposed of, and said to them, "I wish you to take the balance of my property and divide it between you, without hard feelings." The three brothers insisted that this revoked the will, and gave them the property, to the exclusion of the nephews and nieces; but the Supreme Court decided otherwise.\*

Quite likely Peter Schwartzwelder meant to make a will when, as lately as 1875, and in the generally well-educated city of Hagerstown, in Maryland, he made out the paper which, after his death, his relatives found very carefully stowed away in his safe. It was headed, "What I *owen* is as follows." Then followed a curiously misspelled list of assets: "Brick house on the *publick*." "3½ *shears Waynsborro Turnpik* company," and like items. Jumbled with these were what seemed meant for bequests: "Sarah Schwartzwelder, of *Cuberlend, Myland, bother* Isaac *widdow* one thousand or perhaps *tu* thousand dollars." "My houses to be sold, and the *proceeds* paid over to the *respictive* parties named in my will, perhaps J. W. if *qits dukg licker*." Last of all was a clause, "I appoint for my *adminis-treatirs*," giving two names, followed by the signature, Peter Schwartzwelder.†—And quite likely Mr. Patterson, of Millers-town, in Pennsylvania, meant to make a will. After he died, there was found among his papers a memorandum-book in which he had written, in pencil, six paragraphs, each of which seemed intended as a legacy. But they were not connected, were not entitled as a will, nor signed (except the last one), nor witnessed. They were nothing but separate entries in a memorandum-book.‡ In both of these cases the courts refused to receive the paper as a will, because it bore no clear indications that it was intended

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\* *Rodgers v. Rodgers*, 6 *Heisk.* 489.

† *Lungren v. Schwartzwelder*, 44 *Md.* 482.

‡ *Patterson v. English*, 71 *Pa. St.* 454.

for one. Very likely it was. But it might have been only a memorandum of what the writer thought he would put in a will which he expected to make.

- A remarkable instance occurred in Pennsylvania. A husband and wife agreed to make wills in each other's favor. The wills were prepared, by which each gave his or her property to the other. But by accident or carelessness, the husband signed the wife's will, and the wife signed the husband's. The mistake was not discovered until after the death of the husband, when the wife desired to offer his will for probate. Of course, the paper he left could not be proved as his will, for it was only subscribed by her. The legislature passed a special act authorizing correction of the mistake. But the courts said that this could not be done. When the husband died without a will, his property vested at once, by law, in his heirs. For the legislature to allow a will to be made for the husband afterwards was, in effect, taking the property of the heirs away from them and giving it to the widow. This is forbidden by the Constitution.\*

Truly there are few matters upon which it is better worth while to consult a lawyer than that of making one's will.

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\* *Alter's Appeal*, 67 *Pa. St.* 341; *Matter of Alter*, 7 *Phil. (Pa.)* 529.

## V.

# TRAVEL AND TRANSPORTATION.

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### CHAPTER XXXVII.

#### EXPRESS COMPANIES.

##### THEY ARE COMMON CARRIERS.

THE business of express companies is of very recent origin and rapid development. Very soon after it attained some magnitude, the question arose whether they were "common carriers." All readers probably understand that long-established rules of law impose upon common carriers a stringent responsibility for the safety of the merchandise in their charge. In recent years, however, they have been, in nearly all the States, allowed to diminish this responsibility by making special agreements with owners and shippers that they should not be liable for specified losses, or that they should not be required to pay beyond a stated value for the property if lost. The express companies contended, earnestly, that they ought not to be considered common carriers, but a new and distinct class of public servants. The railroad or steamboat in which their messengers travelled did (they contended) "the carrying." But the majority of decisions have been that they are responsible as common carriers. This has probably become the general rule throughout the country. It has led to a practice of their stipulating, in their receipts, for a more limited liability.



“VALUE ASKED, NOT GIVEN.”

When the inexperienced customer carries a parcel to the express office, the man behind the counter usually takes it, uncere-  
moniously, and at once begins to write as fast as possible upon  
a printed blank. “How much is it worth?” he asks. The cus-  
tomer’s mind is not made up beforehand upon this point; he  
does not know the precise value, nor, indeed, why the question  
is asked. While he ponders, the clerk hurriedly finishes the  
writing, dashes a piece of blotting-paper across the leaf, so as  
nearly to obliterate the written words, passes over the receipt,  
and reaches for the next parcel. But if the customer afterwards  
examines the paper closely, he will find upon it the talismanic  
words, “Value asked, not given;” and will see, moreover, that  
the document contains a clause in fine print declaring a special  
agreement between him and the company that he is not to de-  
mand more than fifty dollars in case the parcel is lost, unless he  
has disclosed its higher value and paid extra expressage.

This method of doing business ought to be understood by the  
public, because the courts have held that it is, in effect, asking  
the man who sends the package if it is worth more than fifty  
dollars, and that the company has the right to know this, so that  
it may take adequate care of the parcel according to its value.  
If the agents of the company ask, even in this vague way, they  
have the right to be fairly informed. Several curious lawsuits  
have arisen on this point. In one case, the owner of a quantity  
of valuable jewelry wished to send it by express, but knew he  
would be charged high expressage if he disclosed its value. So  
he packed it shabbily, carried it to the express office, declined to  
answer the question as to value, and the agent took it at the  
cheap rate. It was lost, and when he sued for damages, the  
court held he could only recover the fifty dollars.\*—The same

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\* *Southern Express Co. v. Everett*, 37 *Ga.* 688. *Earnest v. Express Co.*, 1  
*Woods*, 537, was a very similar case.

rule was adjudged in a case where glassware was packed in an ordinary way, and its character purposely concealed from the express company, lest there should be an extra charge. The company sent the glass without the special care appropriate, and it was broken. The court held the owner could not recover its value.\*

But if the express company does not ask the value, the owner is not bound to volunteer information. There was a case where a noted firm of silverware manufacturers packed some silver coin, and gave it to a cartman to carry to the express office. But the cartman did not know what was in the parcel. When he reached the express office, behold, there were two counters—one for receipt of ordinary merchandise, and one for money and valuables. He knew no better and meant no harm, and handed his parcel over the ordinary counter. It so happened that the clerk neglected to ask what was the value. The parcel was lost. When the manufacturers brought suit for the value, the court held that as the value was not asked, and no deceit was practised, they were not limited to fifty dollars, but could recover the full value. Verdict for the plaintiffs.†

A remarkable case in this branch of the law arose upon a loss of a box of watches. It was four times tried by juries, and four times argued and decided in the New York Court of Appeals; and the final decision was not reached until fully fifteen years after the watches were lost. The circumstances were that the French watch-importing firm of Magnin, Guédin, & Co. sent a box of watches to customers in Memphis by Adams's Express. The full value of these watches was nearly \$2500. When the messenger of Magnin, Guédin, & Co. brought the parcel to the express counter, the clerk in charge gave him a receipt, containing, in the printed part, this ominous clause: "If the value of the property described is not stated by the shipper, he will

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\* *American Express Co. v. Perkins*, 42 Ill. 458.

† *Gorham Manuf. Co. v. Fargo*, 35 N. Y. Superior Ct. 33A.

not demand of the express company more than fifty dollars for the loss of the property." But the clerk asked no questions as to value, and the messenger did not volunteer any information; he simply took his receipt. What became of that box is unknown. Probably it was stolen on the way; at all events, the watches were never delivered in Memphis, and the empty box was found a year afterwards at Gowanus, Long Island. The watch-dealers sued the express company for the whole value. They contended that the express company's clerk should have asked what was the value; as he did not, the senders were not chargeable with any fault. The express company showed that freight was carried in two departments—one for ordinary goods, and another for valuable packages, the latter always carried in locked safes and under extra precautions. Had the clerk been informed that this parcel contained watches, he would have sent it by the valuable-package department. Moreover, as the risk and expense are greater, the expresses charge a higher rate for valuables; but this is lost if they are not notified of the value. Upon these facts the Court of Appeals sustained the company. Express companies have a right to know the value of a parcel. And if a condition that the shipper shall state the value is inserted in the printed receipt, this is the same in law as making a demand on the shipper to disclose the value, and he must give the information or risk his package to the ordinary-package department at the value given. His keeping silence when the receipt is furnished is a breach of his duty to impart the information, and casts upon him the liability for all risk, except what the express knowingly undertakes.\*

Cases of one class are excepted from this doctrine—those where the shipper can prove that the persons in charge broke open his box wilfully and appropriated his watches. Affirmative misconduct is worse than negligence, and is not covered by

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\* *Magnin v. Dinsmore*, 70 N. Y. 410.



a limitation. Such cases, however, occur but seldom, and it is still more rare that a shipper can prove the facts.

The general result is that when one carries a parcel to the express office, he must answer truly the questions asked him, either orally or in the receipt tendered, as to value, or be contented to risk all above the specified limit. But he is not bound to tell the value unless he is in some way asked.

#### SENDING GUNPOWDER OR NITRO-GLYCERINE.

Analogous to this duty of disclosing value, and still more stringent, is the obligation which rests upon any one desirous of sending explosive or dangerous goods by express to disclose their true nature. This subject is partially regulated by statutes; but, independent of these, the common-sense principle of the law is that the shipper must give fair notice, either specially or by mode of packing, and by the nature and usage of his business, of the dangerous character of what he sends.

Where reasonable suspicion arises that explosives are in a package, a proper examination may be made, and any delay of the goods, needed for that purpose, would undoubtedly be justified. This position is well illustrated by lawsuits which arose out of an explosion in San Francisco. The circumstances were that a box or case was brought to the New York freight office of Wells, Fargo, & Co., addressed to San Francisco, which appeared correct, and was forwarded. In fact, it contained nitro-glycerine; but the affair happened twelve or thirteen years ago, and before carriers understood the peculiarities of that article. No questions were asked, and no information was given about the contents. On the trip the case was observed to be leaking; something which, to the inexperienced eyes of the men in charge, looked like salad oil, was seen oozing from it. Therefore, when they reached San Francisco they took it into a yard and began opening it with a mallet and chisel to see what was the matter inside. The "salad oil" exploded, killed everybody

near by, and damaged, very badly, the express office and the building adjoining, which was occupied by the Union Club. The owners of the buildings sued the express company for damages. The court said the company was bound to repair its own office, but was not liable for the injury to the club building, because not in fault; the agents of the company were justified, under the circumstances, in examining the leaky box; and, as they had no means of knowing the danger, they could not be called careless.\* The express company then sought for the shipper and sued him, in New York, for damages sustained to the express building. His name was "Burstenbinder," and the court decided against him on the spot! The judges said that it was no defence, that the express people brought the calamity upon themselves by trying to open the box. It was the duty of the shipper to have notified them what dangerous substance was within, and his neglect rendered him liable for the consequences of handling it like ordinary freight. The expressmen were not in fault in opening the case; on the contrary, it was their duty to do so and to stop the leakage.†

#### MISCARRIAGE AND MISDELIVERY.

According to the law established in most of the States, the undertaking and duty of an express company, in respect to the delivery of parcels, are quite different from those of other carriers. The expressman undertakes to find the person to whom the parcel is addressed, and deliver to him, or at his residence or place of business. Indeed, expresses have arisen, in great measure, out of the need which business men experienced for a class of carriers who would take a higher care of parcels, and greater pains in making early and correct deliveries, than can be expected of other carriers. Persons having packages transmitted

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\* Nitro-glycerine Case, 15 *Wall.* 524.

† *Barney v. Burstenbinder*, 7 *Lans.* 210.

to them by express have a right to expect that the messenger will bring and deliver them. To keep a parcel in the express office and notify the person to come for it is not enough. In war times, there was a soldier whose pay was sent to him in a money package by express. It safely reached the town where he was; but it was not addressed to any particular street number, and the agents of the express did not know where to find the owner. They looked in the directory; but as soldiers make only temporary sojourns, they are not usually entered in directories, and this man's name was not found. Then the agents wrote a letter to him, addressed to the post-office of the town, and put the parcel in their store-room until he should call for it. Before he received the letter, the store-room and the parcel were burned. The courts held that the express company must return the money; it had not performed the duty of finding the man and making the delivery.\*

Suppose the messenger finds the place where the man ought to be, and he is not there; he has gone away from his house, or his store is shut up. In such cases, according to an Indiana decision, the company's duty is discharged by leaving a notice to call for the parcel. If the delivery is prevented by the consignee's absence, the express is only responsible for taking care of the parcel for him while he is gone; it is at his risk.† And in a Pennsylvania case the same rule was declared. The express messenger called at the store where the package should be delivered, but it was closed. He left a notice for the owner that it had come, and went on his rounds. When the owner received the notice, he immediately sent a clerk to the express office for the parcel; but as the messenger had not returned with it, the clerk could not get it. In the afternoon the express messenger brought it back to the office, and then it was placed in the fire-

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\* *Witbeck v. Holland*, 45 N. Y. 13. See 55 *Barb.* 443; 38 *Haw. Pr.* 278.

† *Adams Express Co. v. Darnell*, 31 *Ind.* 20.



proof safe, to await the owner. But that night a fire broke out in the building; the watchman took the parcels out of the safe to send them to a more secure place, and this one was lost in the transfer. When the owner of the parcel sued for the value, the judgment was that he could not recover; the express company had discharged its duty in sending the parcel to his store and leaving a notice, and after that it was at his risk, unless the express people were actually careless about it.\*

During the lifetime of the Artisans' Bank in New York city, an expressman brought a package containing \$1500, addressed to the cashier by name, to the banking-house, and gave it in at the receiving teller's window to the teller in charge. From there it disappeared; the cashier never got it, and the bank sued the company, claiming the parcel should have been delivered to the cashier in person. The company won, but it was on the ground that the money belonged to the bank, and it was as proper to deliver the parcel to their receiving teller as to their cashier. If the parcel had been the property of the cashier personally, and the company, understanding that, had received it to carry to him, leaving it with the teller could not have been sustained.†

#### BAGGAGE EXPRESSES.

Is there any departure from these principles in respect to the delivery of articles intrusted to what are called "Baggage Expresses" in the large cities? Travellers notice that when the agent of the city express comes through the cars of an arriving train, shouting "Baggage for New York" (or Boston or Philadelphia, as the case may be), he is affable and suave. He meets the wishes of travellers in all their variations, and will give almost any assurance as to the delivery which is necessary to secure an

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\* *Howard Express Co. v. Wile*, 64 *Pa. St.* 201.

† *Hotchkiss v. Artisans' Bank*, 2 *Abb. App. Dec.* 403.

order. It is noticeable, also, that when the city expressman calls at a house for a trunk to be carried to the depot, he makes no objection to stairs; he goes willingly up two or three flights for the article, and his horses will stand patiently while he is gone. But when baggage is to be delivered, the phenomena are different. Now the driver has scarcely time to bring the trunk fairly inside the door, and cannot think of leaving his horses in order to carry it up-stairs, unless extra payment is made. There is great difference between the demeanor of the city expressman when he comes to obtain baggage and when he comes to deliver it. So great, indeed, has been the complaint of the discourtesy of drivers of the older companies in this respect that it has led, in one or two cities, to the establishment of expresses distinctly undertaking the service of carrying trunks up-stairs.

So far as delivering trunks for persons in houses occupied by one family is concerned, it is probable that the legal duty of an expressman is fully discharged, provided he has made no other promise, by his delivery of baggage safely within the front door. But the expressmen claim more than the courts would probably allow when they assume to apply the same method in delivering at the large buildings which are divided into offices or flats occupied by independent tenants. A typical complaint frequently made public through the city newspapers is that of a traveller who placed his trunk in charge of a city expressman to be delivered at his office or apartment, and the expressman has brought it merely to the building, but refused to deliver it at the owner's rooms; has, perhaps, carried it away because there was no one to pay an extra charge for taking it up-stairs; or has left it in the hallway on the ground-floor, and it has been lost.

It is not probable that the courts would sustain this practice. It has, to be sure, been decided that a city expressman who takes a trunk to carry it to a depot may leave it in the general baggage-room there, and it will be at the owner's risk. The

expressman is not bound to wait till the owner arrives.\* But here the owner has no distinct place or premises in the depot; the baggage-room is the proper place.—The decision does not apply where an express company takes charge of a trunk addressed to John Smith, who is a tenant of a distinct portion of some immense caravansary, and leaves that trunk on the ground-floor. Here it cannot be considered that the engagement of the carrier is fairly discharged, unless John Smith, or some one authorized for him, comes down and consents to receive it there. If he demands to have it delivered to his rooms, he ought to have the right to claim this, subject, of course, to a just and reasonable charge for the entire transportation.

“C. O. D.”

The letters C. O. D. upon a parcel are a sort of rebus which expressmen use; and the answer is “Collect on delivery.” Soon after expressmen began to carry parcels of goods from merchants to their customers, the merchants said, “Cannot you take a bill for the price, and collect it also?” The expressman would say, “Yes.” The merchant would give him the bill, and the expressman would write on the parcel, “Collect on delivery.” This was afterwards shortened to “Coll. on Del.,” and then to “C. O. D.” It is convenient to know that if one wishes to send articles away, and have money brought back in return, it can be done by telling the expressman how much money is expected. The express agent who takes the parcel will mark C. O. D. upon it; and the agent at the other end, who has charge of delivering the parcel, will not give it up unless the money is given to him. If he should make a blunder, and give it up without getting the money, the express people would have to pay it themselves.

In a case recently decided, merchants in New York forwarded goods to a buyer residing in Troy, marked “C. O. D., \$94.28.”

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\* *Henshaw v. Rowland*, 54 N. Y. 242.



When the carrying company found the purchaser at Troy, he offered his check in payment of the money. It was drawn payable to the order of the merchants by whom the goods were sent. The agent of the carrying company accepted the check, delivered the goods, and sent the check to the merchants. They received it without objection. Subsequent results showed that this was a mistake. They sent the check in the usual way to be collected, but it was returned protested. They then sued the carrying company. The court said that the company would have been liable if the merchants, when the check had been forwarded to them, had refused to accept it, or had accepted it upon condition. The company, by receiving the package marked C. O. D., came under obligation either to bring back the package, or the money in place of it; it could not discharge this obligation by bringing back a check: and if the merchants had said, "We only accept this check to see whether it will be paid," they would have retained the obligation in full force. But by accepting the check unconditionally, they waived the obligation of the company, and gave their approval to the act of the company's agent in taking the check instead of the cash. Thus an express agent who takes a check for a parcel marked C. O. D. takes it at the risk of the company. He should satisfy himself that it is unquestionably good before he surrenders the merchandise.\*

Persons who receive parcels by express need also to understand that they will not be delivered until the money is paid. It is entirely unreasonable to find fault because the agent will not leave the bundle and call for the money some other day. He is responsible to return the parcel or pay the money; and he cannot be expected to bear this responsibility and have the trouble of calling three or four times. Every business man understands this, and takes pains to have money in readiness to pay for all C. O. D. parcels when they first come. Even if he should sus-

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\* *Rathbun v. Citizens' Steamboat Co.*, 76 N. Y. 376.

pect the package to be a swindle, if he wants to look into it and see, he will pay the charges; then, if it is a swindle, the agent ought to pay the money back. There was a boy named Hintermyre who bought a ticket in a "gift enterprize" which advertised to distribute prizes. A few weeks afterwards he received a letter saying he had drawn a prize worth \$500, and it would be sent to him C. O. D., and he was to pay \$25. Greatly rejoiced, he borrowed some money and went to the expressman's house for the box. The expressman was away from home, but his housekeeper had the box, and gave it up on receiving the \$25. The boy took it home, opened it, and found there was nothing in it but old newspapers and sticks of wood. The whole plan was a contrivance to cheat him out of his money by having the expressman collect it before he had seen what was sent. Hintermyre went immediately back to the housekeeper and showed her what was in the parcel. She was an honest woman, and gave him back his money; and the judges said she did just right.\*

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\* *Herrick v. Gallagher*, 60 *Barb.* 566.

## CHAPTER XXXVIII.

## RAILROAD COMPANIES.

BARELY fifty years have elapsed since the first railroad-tracks were laid and the first locomotives employed in this country ; but the business has assumed a magnitude which has given rise to an immense body of legal decisions. Only a few of the most salient aspects of this subject can be mentioned. The Law of a Railway Trip is our subject.

## THEIR PRIVILEGES AND BURDENS.

Railroad companies enjoy extraordinary privileges. In rural regions they obtain the right to run their roads over the country wherever may be topographically advantageous, crossing farms or highways, cutting through buildings, ruining villas, and disturbing trade ; in cities leave-is given them to engross streets, darken dwellings, obstruct shops, and stun the neighborhood with the rattle and roar of trains. Moreover, the management of a railroad involves elements of much danger. The companies assume to keep steam-boilers on wheels running at all hours in various directions ; to drive immense caravans of weighty cars across the land at highest attainable speed ; to carry thousands of lives back and forth over most complex and difficult engineering works and structures. In view of the sacrifice and risk which the general public thus incur, the courts hold the companies to a very high degree of care, skill, and liberality of expenditure in the performance of their duty of providing convenient and safe facilities for travel. They must keep their roads in steady operation. Hard times or dull business will not justify a railroad in suspending trains ; the company may be compelled,



so the courts have said, to run, even at a loss, because it took the right of way on an engagement to operate the road, and must perform its part of the bargain.—Directors and officers must use the utmost foresight, attention, and skill, towards their passengers, in the entire management of the road. To take ordinary care is not enough; they must take the best care. The entire road, its track, bridges, switches, all its parts and equipments, must be constructed in the safest and best manner, according to the demands of travel. An Englishman was travelling in a train upon a railway bridge across the River Dee, when the bridge fell in, and he was badly hurt. In answer to his suit for damages, the company did not dispute that the bridge was weakly built; but said that this was no fault of the company: it had employed an eminent engineer and given him all facilities, and the fault was his if the bridge was not strong enough. The judges said this was no defence; the company was bound to have a safe bridge.\*—The engines, moreover, must be in all respects well constructed, the cars sound and strong, and both equipped with the most approved appliances for securing safety of travellers. The time-table and hours of running trains must be judiciously planned, so as to avoid risk of collision. On the Harlem Railroad the trains were, at one date, so timed that the afternoon accommodation train from New York should pass Mount Vernon just one minute earlier than the express train for New York. There were a double track, proper switches, careful rules and regulations; no fault was proved against the management, except the fact that only one minute was allowed between the trains. One day, when the accommodation train was perhaps a fraction of a minute late, an elderly man, infirm and partly blind, who was a passenger by the accommodation to Mount Vernon, did not see that the express was dashing up as he stepped from his car,

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\* *Grote v. Chester & Holyhead Railway Co.*, 2 *Exch.* 251; 5 *Eng. Ry. Cas.* 649.

and he was run over and killed. The court said that it was gross negligence for the company to arrange its time-table so that within a minute of the arrival of one train at a station another should pass at full speed, with no special arrangement made to protect travellers; for all experience shows that trains cannot be run to meet the precise instant appointed. And the widow recovered \$5000.\*—Moreover, skilful, faithful, and temperate men must be hired for conductors, engineers, and brakemen; it will not do to keep a drunkard in employ after the superintendent learns his habits; and each of these must discharge his duties with skill and good judgment, even if novel and difficult circumstances arise.

As a train of the Vicksburg and Meridian Railroad was approaching Jackson, it was stopped by a wrecked freight train which obstructed the track. To avoid delaying the passengers, the conductor arranged for a substitute train on the Jackson side of the obstruction; and then announced that all who desired to take it could do so by walking around the wreck to the new train. The distance was about a thousand feet. The time was midnight, dark and rainy; and there was a ravine, a few feet wide, which the passengers must cross. The conductor personally inspected the path, and considered it safe; and, to obviate the darkness, he had a fire built of pine, near the ravine, and stationed employes along the path with lanterns. All the passengers, nearly thirty, crossed in safety, except one. He fell into the ravine, and broke his leg. For this injury he brought suit against the company. The court held that he was entitled to recover, because the conductor, although energetic, skilful, and prudent in his arrangements, did not do the very best that could be done. He neglected one precaution which might have been taken, and would probably have saved the injured passenger. That was to have stationed some one at the ditch crossing

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\* *Gonzales v. New York & Harlem R. R. Co.*, 33 How. Pr. 487.

to hold a light, and call out to passengers as they drew near, "Take care of the ditch."\*

A boiler-bursting case which occurred in Chicago some years ago illustrates both the strict duty of providing perfectly safe means of travel, and also another aspect of this topic—how the courts deal with cases where the cause of the disaster is not at first known. An engine standing on the track in the depot burst its boiler, and a man who was just entering to buy a ticket was thrown down, and bruised so that paralysis resulted. He did not know what defects in the boiler caused the explosion, and the company's men would not give him information. So his lawyers decided on bringing an action founded merely on the fact that the boiler burst. The company's counsel argued that this was not sufficient ground; the injured man must show some defect in the making or management of the engine. But the court decided this point against the company. They said that such a company is only free from liability after it has taken all precautions, has employed skilful persons, provided sound materials and machinery, and used all useful tests to prevent defects. Manufacturing iron into a boiler is a scientific process, and there are tests for ascertaining whether the iron is sound and the construction skilful. Human experience shows that well-made and carefully used boilers do not usually burst, and the cause of bursting in most instances is traceable to some defect or fault. Therefore the court said that the company was to be considered in fault for having a poor boiler until proof was made that it was a good one. The company then called engineers and boilermakers, who testified all about the boiler—how it was made, that it was of good material, and had been recently inspected and repaired. After this the court said that a good defence was made out; the company was not liable if every precaution had been taken.†

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\* *Vicksburg & Meridian R. R. Co. v. Howe*, 52 *Miss.* 202.

† *Illinois Central R. R. Co. v. Phillips*, 49 *Ill.* 234, and 55 *Ill.* 194.



Courts are not entirely agreed in taking for granted, from the occurrence of a casualty upon a railroad, that some person has been to blame; but most of them think this right, for two reasons. One is that such a presumption is according to the real probability. If a road is well built and equipped, and the trains are skilfully and prudently managed, there will not, usually, be a disaster; therefore, a disaster indicates some mismanagement. Another reason is that the company has by far the best means of knowing and proving the facts: it can show the true explanation of the disaster much more easily than the passenger can. Something, however, depends upon the nature of the occurrence. Unless it is dependent upon railway management, there is no reason for applying the rule. If a train should be struck by lightning, or thrown from the track by an earthquake, the circumstances themselves would indicate that neglect of duty was not the cause.

#### THE LAW OF THE DEPOT.

The decisions agree that a company must secure a careful and thorough supervision of all matters connected with the management of its depots or stations in which the safety of passengers is involved. Extreme care in this respect is due from the station-master and all employés in charge. It may well be doubted whether sufficient care is usually exercised. A large depot is a somewhat dangerous place to inexperienced, infirm, or ignorant passengers. To managers and train hands familiar with the working of the road, and acquainted with its timetables and rules, arrangements may easily seem simple, and precautions sufficient, which to passengers are bewildering. Indeed, to one who seldom visits a large station its arrangements are, under the best of direction, confusing. The signs and signals, the regulations of ticket-office, baggage-checking, and gate-keepers, the variety of trains coming and going, the complexity of tracks branching in various directions, the hurrying crowds of travellers—all these bewilder any one to whom they are not

familiar; and if any infirmity of sight or hearing, lameness, age, or illness be added, the danger becomes serious. Yet the companies are liable if their agents do not maintain such general arrangements at a station as provide the utmost security against accident to persons coming to or going from their train. At a station on a Western railroad where corn was taken on the trains, it was such a common thing for small quantities to fall on the track that the cows of the neighborhood were wont to loiter near by, watching for chances to get a mouthful. No watchman was employed to drive them away, and the consequence was that a train ran over a cow, a car was thrown off the track, and a passenger within was badly hurt. The court said he was entitled to recover, because the company had neglected a plain duty to keep a watchman at that spot.\*

Platforms and stairways about a railroad-station have often given rise to lawsuits where the station-master has allowed them to get out of repair and a traveller has been hurt in consequence. While Andrew Johnson was President, he made a trip over the Pennsylvania road; and wherever the train stopped at way stations, the people gathered to look at him and hear a speech. At Johnstown the station platform broke down under the weight of the unusual crowd. One of the persons who was hurt sued the company, and proved that the platform was old and the timbers rotten. But the court inquired whether he had come to the station to take the train, and he said, No; he was only there to see the President. The court said, if that were the case, he had no ground to sue, for the company was not bound to keep a strong platform for a crowd of sight-seers; but if any passenger had been injured by the defect, or even any person who had come to meet a passenger or to see one off, he could have recovered damages.†

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\* Chicago, Rock Island, &c., R. R. Co. *v.* McAra, 52 Ill. 296.

† Gillis *v.* Pennsylvania R. R. Co., 59 Pa. St. 129.

A station-master on the New Jersey Railroad allowed a hole in the floor of his station to go unmended, until one day a lady passenger, on alighting from the cars, caught her foot in it, and fell and was badly hurt. At Wells River depot there was a flight of steps to the platform. The depot-master did not keep the stairway lighted properly at night; and a lady passenger who had come to take a night train, in groping about in the dark to find her way, fell down the steps and injured herself so as to become a cripple for life. In these cases the companies were required to pay. At one of the stations of the New York Elevated road the people in charge allowed the steps and platforms to get icy, from rain and snow falling and freezing; and a passenger slipped, fell, and was permanently hurt, so badly that the jury gave him \$9000 damages. The judges said that this was right. The agents of railroad companies must take more than mere ordinary care in keeping their floors and platforms in a safe condition for passengers; they are bound to use "all such reasonable precautions against injury as human sagacity and foresight can suggest." They are bound to be on the alert during cold weather to see whether there is ice on the platform, and to remove it or make it safe by sanding it or putting ashes upon it, or in some other manner.\* And so, in a variety of other instances, the companies have had to pay heavy damages to passengers because the platforms were neglected.

Attention is due to the condition of the waiting-rooms, and to the behavior of persons who congregate in them. Passengers have a right to expect that they will be protected from the violence of fellow-passengers. Noisy, turbulent, drunken, and quarrelsome persons have no legal right to remain in and about the station; and if a station-master has reason to anticipate disorderly conduct, he should interfere to repress it. And he may, no doubt, order even quiet and orderly persons to leave if they are not in

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\* *Weston v. New York Elevated R. R. Co.*, 42 N. Y. Superior Ct. 155.



the depot on business connected with travel by the road. A depot is not a public lounging-place. It is the property of the company for the uses of its business, and may be kept free for the convenience of travellers or those attending to freight. Persons who interfere with the comfort and convenience of the company's customers, not only may be, but ought to be, excluded. A station-master may order such a person to leave, and, if he refuses, may have him put out, always taking care that he is not hurt, and that no unreasonable or unnecessary force is used. In Iowa, a woman was badly injured in entering the cars, or trying to, and a suit was brought. The company said she was to blame, for she was trying to get aboard the train before it was ready; if she had waited till the proper time, she would have had no difficulty. She and her husband then testified that the depot-master had allowed people to smoke in the passenger-room until the air was so offensive and unwholesome that it actually made her sick, and this was the reason she had tried to get into the car so early; moreover, there was no notice but that the train was ready; she supposed it was. The court said she was right. If the company's agents would not keep the passengers' room in decent condition, they must expect passengers to be in haste to enter the cars.\*

These are not nearly all the cases which might be mentioned in which neglect of duty by those in charge of a depot may expose the company to heavy damages. But they are enough to explain and illustrate the rule of the courts, which is that extreme care must be taken by all these employés in respect to everything which involves the safety of passengers.

#### TICKETS.

When the traveller passes through the depot to take the train, he will see a little wicket labelled "ticket-office." And, soon after

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\* *McDonald v. Chicago, &c., R. R. Co.*, 26 *Iowa*, 124.

the train starts, a ruddy, burly, blue capped and coated man bursts in at the front door of the car with a cheery call, "Tickets, gentlemen!" All this is according to law. Through not knowing, or not believing so, Mr. Falkner sustained the inconvenience of being put off the cars. The company had found a good deal of inconvenience from passengers riding on freight trains, and had made a rule that no passenger should be carried on a freight train unless he first bought a freight-train ticket. Falkner would not take the trouble to buy a ticket, but, when the conductor came, offered to pay fare. Conductor said he was forbidden to take fare—must have a ticket. Passenger could not produce a ticket. Conductor stopped the train, and put him off. Lawsuit. The court said that a railroad company has a right to require passengers to buy tickets. So Falkner lost his lawsuit as well as his trip.\*

Perhaps he would have succeeded better a dozen years ago. Upon the whole, the progress of the law as to this point has been in favor of the companies. The current of thought in the courts, years ago, was that a passenger had the right to be carried if he had paid, or would pay, fare; if he was in the right upon this point, his having a ticket or losing it, or detaching a coupon, or the like, was a minor matter. But the lawyers of the companies have argued, successfully upon the whole, that modern railway business cannot well be managed punctually and efficiently if conductors are liable to be required to make change with every passenger, or listen to his explanations why he has not a ticket. And the courts are now quite generally agreed that a company may make a rule requiring passengers to buy tickets, and may enforce it either by stationing a gate-man to exclude them from the cars if they do not show tickets, by charging a moderate extra fare if paid in the cars, or by putting a ticketless passenger off the train.

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\* *Falkner v. Ohio, &c., Ry. Co.*, 55 Ind. 383.

But there are some important conditions imposed upon this privilege, favorable to travellers. One is that the company must have the ticket-office open, with an agent there to sell, a convenient time before trains start. There have been several lawsuits in which the passenger has won by proving that he could not buy because the agent was not on duty at the proper time. The courts say it is not reasonable to require a man to buy what no one is ready to sell. Then, the company must give notice of its regulation. It was upon this point that Mrs. Greenwood won her case. She got upon a freight train, just as Falkner did, without the magic pasteboard, and the conductor refused to take money, and put her off. She proved that the company had previously allowed passengers to pay fares on freight trains; that she had often travelled so, and had never heard of any new rule. The court said that, under these circumstances, she was entitled to damages. The company said that the rule had been posted in all the waiting-rooms of the depot. The court said that made no difference if Mrs. Greenwood did not see the notice. She recovered \$125 damages.\*—Moreover, a conductor cannot put a ticketless passenger off in the wild woods, or wherever the train may happen to be when he is found, but must run onward to the next station where one can buy a ticket. The conductor put Mr. Flagg off when the train stopped at a water-tank, a quarter of a mile distant from any station. There was a statute which said he might be put off at any "usual stopping-place." And the company's lawyer argued that the tank was a usual stopping-place; for, said he, "the trains usually stop there for water." But the judge said (in effect) that this was ridiculous.†

If any one is curious as to the legal nature of a ticket, that point has been the subject of considerable discussion. In early days, the companies claimed that it was the contract, and they

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\* Lake Shore, &c., Ry. Co. *v.* Greenwood, 79 Pa. St. 373.

† Chicago, &c., R. R. Co. *v.* Flagg, 43 Ill. 364.



printed all kinds of terms and engagements on it. But it came to pass that the government at Washington imposed a five-cent revenue stamp upon all kinds of written contracts; and then the companies suddenly found out that their tickets were not contracts. The best of the answers given is one by a New York court that a railway-ticket is a certificate or token issued by the money-taker of the company to the traveller as his evidence to the conductor that he has paid fare.\* If, then, there is anything printed on it by way of proposal or notice to the traveller, and the traveller reads it, he has received notice, and will act accordingly. But if he is a foreigner and cannot read English, or if it is night and the car too dark for reading, as has happened sometimes, whatever is printed on the card goes for nothing. According to this, it may seem better for the passenger to put his ticket into his pocket without looking at it; but that is not common-sense. A traveller should examine it, and behave as it directs, if reasonable. The courts would not encourage his evading notice.

Suppose a traveller buys a ticket, but loses it? The early view was that one who had paid fare had a right to be carried. The conductor must let him ride, though he had no ticket, if he made reasonable proof that he had bought one. Lately, the courts think it too inconvenient to require a conductor to discuss the question upon the trip; and, besides, there is no way of protecting the company from having to carry the person who may find it. Most courts now would probably rule that the passenger must take care of his ticket at his own risk, or pay fare a second time if it is lost. There was a commuter on a New Jersey railroad who lost his ticket. The gate-keeper would not let him go in and take the train, and he sued for damages. The company proved that the ticket contained conditions or notices, "No duplicate will be issued," and "This ticket must

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\* *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212.

be shown to conductor each trip." The court said that these were valid conditions, and when the traveller lost his ticket, it was his loss; otherwise, every officer of the company would have to recognize, on each trip, every commuter who might lose a ticket, which would be too much to expect.\*—In Connecticut, a case precisely like this New Jersey case was decided in the same way; but one differing from it slightly was determined in favor of the commuter. In the first of these cases, the ticket bore a stipulation upon the back that it must be shown to the conductor every trip, or fare must be paid for that trip. The commuter had accidentally left it at home; and so informed the conductor. He refused to pay fare, on which account the conductor expelled him; and the court said that this was lawful.† In the second case the commuter had the ticket with him in fact, but could not find it at once. He took it when he started, and he so informed the conductor. Moreover, at night the ticket fell from his clothing. The conductor knew him, and knew that he was a commuter. The court said that to put a person off the train when the conductor knew he owned a ticket, and when the passenger said he had it with him and could find it if he had time, was unreasonable.‡—Reed's case sustains the passenger's view of the subject. At the depot in Chicago, Reed bought a sleeping-car ticket to Crestline. He took his berth, and showed his ticket to the porter. Then he went to another part of the car, and there he had the ill-luck to lose his ticket. Accordingly, when the conductor came, Reed could not produce it. He referred the conductor to the porter who had seen the ticket, but the conductor would not take the porter's word for it. The cars had not started, so Reed went back to the ticket-seller in the depot, and got a note from him certifying that he

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\* *Ripley v. New Jersey R. R., &c., Co.*, 31 *N. J. L.* 388.

† *Downs v. New York & New Haven R. R. Co.*, 36 *Conn.* 287.

‡ *Maples v. New York & New Haven R. R. Co.*, 38 *Conn.* 557.

had sold the ticket to Reed. Conductor would not take this, either. Said he must have "the money, a ticket, or a pass." "Well," said Reed, "I propose to ride here in this berth." Conductor grasped him by the collar and forced him into an ordinary passenger-car, where he rode all night. Next morning his ticket was found at the other end of the sleeping-car, where he lost it. Reed sued for damages, and the jury, on the first trial, awarded him \$3000. The Supreme Court of Illinois set this aside. They adjudged that as the passenger showed the conductor clear proof he had bought a ticket and lost it, he ought to have been allowed to occupy the berth, and should not have been put out of the car; but that \$3000 was extravagant damages. All he could recover was the dollar and a half he paid for the ticket, and some moderate compensation for any trouble or inconvenience arising from being deprived of his berth.\*

Tickets generally read for a trip from one place named to another; and often say "Good for this day only," or "for this train." Here, again, the decisions of courts have grown more favorable to companies, probably because the immense increase of their business has made rules of this kind more needful. There was a Portland man who bought, at Portland, two tickets by the Boston and Maine Railroad to Boston, thinking he could go on one and return on the other. Returning, he offered his ticket, reading "Portland to Boston," to the conductor running out of Boston; but that conductor refused it and put him off. Law-suit. But the court said the company could not be compelled to take the ticket, except as it read, from Portland to Boston. The traveller argued that he had paid fairly for so many miles' travel, and it was just as easy and cheap to carry him one way as the other. The court said such a rule would make great confusion in railway business; the company had the right to know, if it desired, which way travellers were going, so as to provide

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\* Pullman Palace Car Co. v. Reed, 75 Ill. 125.



the right number of cars and manage the trips conveniently to the public.\* Very much the same view has been taken where tickets have been sold "Good for this day only." The general rule seems to be that companies have a right to limit their tickets in such ways, as a means of providing against sudden overcrowding, and of keeping the roads and trains in such order as will accommodate all who wish to travel; and if they require him so to do, the traveller must purchase a ticket for the day he means to travel, and must conform to its terms.† Or if, for any reason, he needs to change his plan, his right is to carry the useless ticket to the ticket-seller or treasurer, and ask for his money back, and not to insist upon riding on a day or train which it does not allow.

For a passenger to surrender his ticket when it is asked is so much a matter of course that there have been very few lawsuits arising upon any one's refusal. In one case, the cars were crowded, and when the conductor came the passenger was standing, because he could not find a seat. He showed his ticket (which entitled him to a seat), but would not give it up, and said, "When you get me a seat, I will give you the ticket." The court said this was lawful. The passenger was not bound to pay fare if not furnished with a seat.‡—Another case occurred in England. The races were approaching, and a man who wished to carry three horses to the grounds bought tickets thus: a first-class for himself, three third-class for three grooms, and one for three horses. He took seat in his first-class car, forward, and the grooms and horses had places in the cars to the rear; but the employer carried the tickets for the whole party. When

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\* *Keeley v. Boston, &c., R. R. Co.*, 67 *Me.* 163.

† *State v. Campbell*, 32 *N. J. L.* 309; *Boice v. Hudson River R. R. Co.*, 61 *Barb.* 611; *Gale v. Delaware, &c., R. R. Co.*, 14 *N. Y. Supreme Ct.* 670; *Elmore v. Sands*, 54 *N. Y.* 512.

‡ *Davis v. Kansas City, &c., R. R. Co.*, 53 *Mo.* 317. See also *Dietrich v. Pennsylvania R. R. Co.*, 71 *Pa. St.* 432.

the moment for starting came, the managers of the train thought it would be too long, so they started the forward cars with one locomotive, and made the rear ones up with another. In the rear train, when the conductor found that the grooms and horses were without tickets, he refused to carry them. Meantime, the employer was travelling onward with the tickets for the whole party. The court held that all this was the company's fault, and the employer could recover damages. The company had no right to divide the train, after the party were all seated, without giving them notice.\*

What shall be said of the right of a traveller to sell his ticket if he does not wish to use it himself? The ordinary traveller is unaware that it can make any difference to a railroad company whether he himself or another person travels by the ticket he has bought, and regards a rule which prohibits his selling it—in case, for any reason, he cannot make the journey—as an unreasonable and causeless one. The ordinary understanding has been that a traveller may sell his ticket unless it contains a stipulation that it shall be “not transferable;” that may prevent a transfer, at least so says a recent English decision. One Aaron took out an excursion ticket and travelled on the forward half of it, and, at the end of the trip, sold it to Howell. He took the cars to come back, and offered the ticket, but was arrested for travelling without paying fare; for the ticket was marked “not transferable.” The court adjudged him guilty, saying that if a ticket is taken for one trip by A, buying it without restriction, and he, for some reason, cannot use it, he may sell it to B, for in this case the company gets full fare. But an “excursion,” or “tourist return,” ticket, as it is called in England, is understood to be issued at a cheaper rate, because the understanding is that the purchaser will come back over the same route. Any chance that he may not do so belongs to the company; and if the ticket

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\* *Jennings v. Great Northern Ry. Co.*, L. R. 1 Q. B. 7.

is given over, at the end of the single journey, by the purchaser to another person, the condition on which it was issued is violated. The party who buys it does not pay his proper fare, but makes the company lose the difference between the reduced return fare and the full fare for the single journey.\*—A similar decision was made in this country in a Pacific Railroad case. Meur bought a through ticket, by emigrant train, from Baltimore to San Francisco. It was expressed to be "for one continuous emigrant passage," and "not transferable." He travelled upon it to Palisade, Nev., which was his intended stopping-place, and then sold it to Cody. Cody took the same train as that which Meur left, and expected to be allowed to continue Meur's journey on the Meur ticket. But the conductor would not permit this; and, as Cody refused to pay fare anew, he was expelled. The court said that this was lawful. Meur had no right to sell a non-transferable ticket.

And according to the view taken generally by the courts, any right which a passenger may have to sell even a ticket not marked non-transferable is reduced to a minimum by the consideration that the passenger himself is not entitled to split it, as it were, into two or three, by taking a part of his journey at one time, and a part at another. One ticket means one trip. If the passenger is allowed to take his trip in portions, it is by the rules or sufferance of the company, not by any legal right found in the contract.† Hence it is very doubtful whether a passenger has a right to sell even a ticket which bears no restriction, except as an entirety, before he has himself travelled at all in virtue of it.

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\* Langdon v. Howell, 48 *Law J. N. S. Mag. Cas.* 133.

† Drew v. Central Pacific R. R. Co., 51 *Cal.* 425; Hamilton v. New York, &c., R. R. Co., 51 *N. Y.* 100; Churchill v. Chicago, &c., R. R. Co., 67 *Ill.* 390; Wentz v. Erie Ry. Co., 5 *Thomp. & Co.* 556; Gale v. Delaware, &c., R. R. Co., 14 *N. Y. Supreme Ct.* 670; Oil Creek, &c., Ry. Co. v. Clark, 72 *Pa. St.* 231.



## WHO IS A PASSENGER?

Claims against railroad companies often involve the inquiry whether complainant was a passenger. For there are rules that a passenger injured by a collision can recover damages, but an employé or a "stowaway" or trespasser on the train cannot; that a company is bound to protect its passengers against violence and injury from other passengers, but not against misconduct of rowdies who force their way on a train; that a passenger is entitled to so much baggage, and the like. All such rules make it often a nice question, Who is a passenger?

A mere "deadhead," or person stealing a ride, is not a passenger; and if he is hurt in a collision or train-wreck, he recovers no damages. But it is not every one riding without paying fare who comes under this rule. The question is not whether the person paid fare, but whether the company had come under an obligation to carry him safely. Take a case of some one who is riding on a pass which was given him because his journey was in the company's business. The stockholders of a company once sent one of their number to make an examination of the road, and the president took him in a special car, free of charge, upon a trip up the road to see how it looked, when a down train ran into the special car and smashed the investigating stockholder. He sued for damages, which the company disputed, because he was not paying fare. In another case, an inventor of a patent car-coupling was negotiating at Portland with officers of a railroad to adopt it, and they asked him to go up to Montreal and see the superintendent about it, and gave him a pass. On the way he was hurt by the car running off the track, and the company refused damages because he was riding free. In both these cases the United States Supreme Court held that the injured person was a passenger. The company had undertaken, for considerations satisfactory to them, to carry him, and was

bound to carry him safely.\*—The pop-corn boy's case is like these. He was a Massachusetts boy who rode back and forth on the Vermont and Massachusetts Railroad to Hoosac Tunnel, on an agreement that he should have the privilege of selling pop-corn on the trains, and should pay thirty dollars a quarter, and carry round ice-water for the passengers. Of course, he did not buy tickets. The train went through a bridge, and the pop-corn boy was drowned. The court held that he had all the right of a passenger to be carried safely, although he did not pay fare.†

A baby may be a passenger. The Great Western Railway in England has the rule that children under three years of age go free; children between three and twelve must pay half fare. Mrs. Austin, carrying her little child, took a trip in which the train was wrecked, and the child's leg was broken, and a suit was brought in his behalf. It then appeared that the mother bought a ticket for herself, but did not purchase any for the child. Yet the child was two months more than three years old, and ought, by the rule, to have paid half-fare. But the ticket-seller and conductor did not ask for any fare, nor inquire how old the child was, and the mother did not make any false statement. The company thought these facts were a good defence; they ought not to be deemed to take any risk as to the child unless his fare was paid. But the court said, Not so. The company undertook to carry the child, and was bound to carry him safely. If they wanted fare, they should have asked for it, or they might sue the mother for the fare. The child was not to blame.‡

Quite a number of such cases have arisen upon what are known as "drovers' passes." In the Western States, where droves of cattle, hogs, sheep, or other live-stock are sent to market over

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\* Philadelphia & Reading R. R. Co. v. Derby, 14 How. 468; Railway Co. v. Stevens, 95 U. S. 655.

† Commonwealth v. Vermont, &c., R. R. Co., 108 Mass. 7.

‡ Austin v. Great Western Ry. Co., L. R. 2 Q. B. 442.

long railroad routes, it is common for the owner to go or send some one on the train to watch the animals, and water and feed them on the way. This attendant pays no distinct fare. Freight is paid on the animals, and that covers the charge for carrying the attendant. Generally these passes contain a stipulation that the traveller assumes all risk of accident, and that if he is hurt, even by negligence of persons in charge of the train, he will not demand damages. But the courts have held that these persons are passengers. The freight on the live-stock is their fare, and the company is bound to use due care. And as to the stipulation, that may protect the company from damages for a mere accident, but not for negligence. The law will not allow companies to require passengers to agree beforehand that the companies may be negligent.

But all these cases are founded upon the idea that the company has in some manner undertaken to carry the person who has received injuries. In cases where he got upon the train by mere mistake, or oversight of the conductor or engineer, it has been held that he went at his own risk.

How does the law stand about travellers who are coming to a train, or are walking away from it after their ride? In one case the company ran a stage from the heart of the town to the station to bring passengers. This ride was free. Mr. Buffett wished to travel by the cars, and he took seat in this stage to be carried to the depot. He intended to buy a ticket when he reached there; but on the way, by the negligence of the driver, the coach was upset and he was injured. The company thought their risk did not begin till he had bought his ticket; but the court thought he could recover for the failure to carry him safely by the coach.\* And the passenger's right to be carried safely continues until he has had fair time and chance to leave the station and grounds of the road at the other end of his journey.

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\* *Buffett v. Troy, &c., R. R. Co.*, 40 N. Y. 188.



If another train carelessly runs over him before he has had time to go across the tracks from his car, or if there are holes and pitfalls in the platforms in which he trips and is hurt, the company cannot refuse to pay damages on the idea that he ceased to be a passenger when he stepped out of the car.

There have been some cases about rowdies and trespassers upon trains. In general, a railroad is bound to carry all persons impartially. But there are exceptions. It has been held that a person who is so drunk as to be annoying and disgusting to other passengers has not the right of a passenger to ride; the conductor may refuse to take him, although he has a ticket.\* But if the company consents to take him, it is bound to carry him as carefully as if he were a sober man.†—In Nebraska, a man sued a company for refusing to take him as a passenger after he had bought a ticket; and the company proved, in defence, that he was a notorious gambler, and was riding back and forth in search of persons whom he could fleece at cards. The judge said this was a good defence. A company is not bound to carry one whose ostensible business is to injure the line, one fleeing from justice, one going upon the train to commit assault or theft or for purposes of gambling, or a person afflicted with a contagious disease by which other passengers would be endangered.‡

#### HIS RIGHTS AND DUTIES.

Enough has already been said to make it clear that passengers are in duty bound not only to pay the lawful fare, but also to obey the reasonable regulations of the company.

But these regulations must be properly announced and enforced. In one of the New York city courts, not long ago, a case was presented in which § a traveller for the Harlem Rail-

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\* *Pittsburgh, &c., Ry. Co. v. Vandyne*, 57 *Ind.* 576.

† *Milliman v. New York Central, &c., R. R. Co.*, 66 *N. Y.* 642.

‡ *Thurston v. Union Pacific R. R. Co.*, 4 *Dill.* 321.

§ According to the journals of the day.

road, having a commutation ticket, and therefore not needing to visit the ticket-office, assumed to go into the depot at a gateway on Forty-second Street, which stood open and was more convenient for him than to go through the passengers' waiting-room, but was for the employés only. Nothing but a placard opposed his entrance, and he had fairly reached the steps of the car when the watchman collared him and pulled him back. He produced his ticket, but this was not deemed satisfactory. He was ejected with some violence, and made to go around and enter through the passenger-room. He recovered two hundred dollars damages. The court said that a company may prevent by force travellers from entering by a gateway that is forbidden to them, but that a passenger who has entered without opposition cannot be turned out because he entered through the wrong door.

The Jersey City Ferry Company sustained a similar judgment a few years ago. It was when the rule was comparatively new forbidding foot-passengers to enter by the gateway for vehicles, and requiring them all to go through the passage by the ticket-office. A passenger who did not know the rule, and had a ticket, entered through the cartway, no one hindering him, and had reached the boat, when the gate-keeper ran after him and dragged him back. He showed his ticket, but, notwithstanding, was put off the boat and made to go around. He also recovered two hundred dollars damages; and the Supreme Court said that if the jury had awarded two or three times that amount, no fault would have been found.\*

The engagement of a railroad company with its passengers is to carry them from one place to another. Clearly this contract is not performed unless the passenger is carried in safety. The companies are under a grave public duty also to the same purport. To take a passenger upon a train at New York and de-

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\* *Compton v. Van Volkenburgh*, 34 N. J. L. 134.

liver him beaten and bruised, or robbed or cut in pieces, at Chicago or Boston is not a performance either of the contract or of the public duty. Hence the more recent decisions recognize very stringently the doctrine that the companies are under an obligation of protecting their passengers against violence and robbery while on the way. They are bound to make judicious arrangements for preserving peace and order among the passengers, and for protecting them from violence and robbery from other persons who may be passengers on the train. A company is not liable for all acts of disorderly passengers, but it is bound to make wise regulations and good arrangements for preserving order, during the journey, among those whom it undertakes to carry, and must pay damages if its conductor and servants do not exert themselves properly and efficiently to enforce these regulations when an occasion arises. A peaceable, orderly passenger has a right to expect that the company will not receive, or will eject, passengers who are turbulent. Mrs. Hinds, in a Pennsylvania case, was injured in a fight among a party of rowdies, who rushed, by sheer violence, without leave of ticket-agent or conductor, into the car where she was; and the company defended her suit successfully on the ground that these rowdies were not passengers, and were not admitted voluntarily, but forced their way into the train.\*—To those whom it accepts as passengers it owes a higher responsibility. In a recent Mississippi case, four or five drunken scamps, travelling in the cars, despoiled a peaceable passenger near them of his hat. He appealed to the conductor, who remonstrated, whereupon the rowdies commenced a fight. The conductor, crying, "Gentlemen, for God's sake, don't get me into trouble!" precipitately abandoned the scene, and left the assailed passenger to his fate. The result was that he was severely injured. He sued for damages, and got six thousand dollars. The court held that a rail-

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\* Pittsburgh, &c., Ry. Co. *v.* Hinds, 53 Pa. St. 512.



road company has full power to put disorderly passengers off the cars, and is bound to exercise this power for the protection of quiet and orderly ones, and said that six thousand dollars was not too high damages where the conductor so shamefully neglected his duty. But if he had behaved like a man—had stopped the cars, called the brakemen and other passengers to assist him, and made the best attempt in his power to put the disturbers off—then, even if he had not succeeded in protecting the passenger from all injury, the company would not have been liable.\*—There have been several such decisions. They have been strongly resisted by the companies as introducing a novel element in their responsibility, and extending their liability beyond the older precedents. But the courts appear agreed upon the doctrine.

#### THE LADIES' CAR, AND THE PULLMAN.

When the traveller, passing from the ticket-office to take his seat in the train, hears the familiar cry "Drawing-room car—forward!" he dimly realizes that there are several kinds of cars, and that it behooves him to make a choice. The companies have long been accustomed to run distinct cars, and even trains, exclusively for freight; and they have the right to do so. Passengers may be excluded from freight cars entirely, or may be admitted subject to such rules relative to buying tickets and similar matters as are reasonable and convenient. The public have the right to be carried, but not the right to go in any and every car. Moreover, if a passenger takes passage by a freight train, he must accept freight-train accommodations. He cannot complain that a cushioned seat, a practicable window, and a boy carrying ice-water are not provided. He has, however, as good a right to be carried safely as when travelling in a passenger car. In a case decided in the United States Supreme Court as

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\* New Orleans, St. Louis, &c., R. R. Co. v. Burke, 53 Miss. 200.

lately as 1876, the judges declared that the rule requiring the companies to take the best care for passengers' safety is as applicable to one kind of cars as to another. Life and limb are as valuable in the caboose as in the palace-car; the same dangerous powers employed, the same dangers exist. The passenger has no better opportunity in one car than in another to protect himself. The rule may, indeed, not require the same precautions to be used on all cars, but it does demand that everything necessary for safety, and consistent with the nature of the conveyance, shall be done.\*

But passengers do not often aspire to ride in freight cars; the "ladies' car" is a more important institution. The law favors the right of the company to set apart a car for ladies, and gentlemen and ladies in company, and to exclude single men, but frowns upon any violence. This mode is a reasonable, prudent one—so the courts have held—of securing the comfort and safety of lady passengers. But it must be enforced in a reasonable, considerate manner. An Illinois conductor refused to allow a colored girl to ride in the ladies' car, and sent her forward into the general-passenger cars. There were vacant seats in the ladies' car at the time, and no objection was made to this passenger except her color. The court held that she was wrongfully excluded.† A conductor can exclude passengers for drunkenness, disorderly conduct, profanity, or other misbehavior, but not for nativity, color, race, social position, or religious or political opinions.—A Wisconsin conductor found a male passenger riding by himself in the ladies' car, and ordered him to leave. Passenger said that there was no seat for him in the general car, that he had ridden in the smoking-car until he was made ill, and therefore he had asked the brakeman to open the ladies' car door for him; and he refused to leave. The conductor called assistance,

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\* Indianapolis, &c., R. R. Co. v. Horst, 93 U. S. 291.

† Chicago, &c., Ry. Co. v. Williams, 55 Ill. 185.

and the intruder was ejected by force. The court said that this was not lawful. The company must keep the bachelors out of the ladies' car in the first place. After one agent of the road has admitted a man alone to a seat in the ladies' car, he is peaceably and rightfully there for that trip; another agent cannot use violence to expel him.\*—Upon the other hand, a passenger must not force an entrance. This was, in effect, decided in a case occurring upon the New York and Harlem Railroad. A brakeman was duly stationed at the door of the ladies' car, to prevent men travelling alone from entering. A bachelor applied to pass in, but the brakeman apprised him of the rule. He yielded to the brakeman for the moment, but watched an opportunity and slipped past. The brakeman was wroth at this misconduct. He seized upon the intruder, and hustled him out; and, according to the narrative given by the latter, treated him with great and unnecessary violence, so that he was "greatly beaten, hurt, injured, and wounded." The court said that the company was entitled to reserve a car for ladies, and was authorized to station a brakeman with orders not merely to give the notice, but to put out intruders also. But his authority was strictly limited to using such gentle and considerate force as would remove the intruder without giving him any useless mortification, suffering, or injury. If he went beyond this, if he used unnecessary violence and injured the passenger more than was needful, he made his employers liable for his excess; and whether there was an excess or not is for the jury to decide in such cases.†—An Iowa case was decided against the passenger. He was somewhat in-

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\* *Bass v. Chicago, &c., Ry. Co.*, 36 Wis. 450. The passenger in one case made a good point against the rule of the company by proving that the very men who expelled him were accustomed to ride in that car themselves, when their work on the train was done, for a while; and the court said that if the company did not enforce the rule against conductor and brakemen, it ought not to do so against passengers.

† *Peck v. New York Central, &c., R. R. Co.*, 70 N. Y. 587.



toxicated when he forced his way into the ladies' car, and was rude and boisterous. Moreover, there were seats to spare in the ordinary cars. He was put out; and complained of unnecessary violence in this, that the conductor did not stop the train. The train was running at ordinary speed at the time, and the passenger claimed it was dangerous and legally wrong to force him across the platforms. But the court said there was no rule of law against it. Railway carriages have been improved so much in recent years that stepping from one car to another is comparatively safe; it is daily done by passengers without accident; and it is not necessarily negligent or unlawful to compel a misbehaving passenger to do it. The company had the right, by its agents, to put the unauthorized passenger out of the ladies' car; and it was for the jury to say whether the agents had done so in a manner which was improper in the circumstances.\*

The drawing-room cars, palace-cars, and sleeping-cars give rise to somewhat different questions. Passengers do not always know the fact that these cars do not usually belong to the railroad company. There may be exceptions on some roads; but, for the most part, they belong to a separate company. The Pullman Palace-Car Company is a prominent owner of them. The general arrangement between the railway company and the company owning the palace-car is that the railway company agrees to draw the car over its road, and allow the palace-car company to let its seats and berths to the passengers who want them. But the railroad company has no share or interest in the charges of the car company for its extra accommodations, and the car company has no part in the fare charged by the railroad for transportation. Whether this arrangement exists because, when the special cars were first introduced, the railroad companies did not care to risk the investment of purchasing them, but preferred to draw them for the inventors, so that the com-

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\* *Marquette v. Chicago, &c., R. R. Co.*, 33 Iowa, 364.

panies are simply continuing to do as they began, or whether there are substantial reasons for continuing the division of ownership as a permanency, has never been made clear in the courts. Apparently it has been used to embarrass plaintiffs. If a traveller, injured or bereft of baggage, sued the palace-car company, he has been told they were not carriers; they did not engage for his safe journey; all they promised was to let him a well-cushioned chair, or a berth, with an undivided interest in a washstand, and this they had faithfully done. If he sued the railroad company, the defence has been, We agreed to carry you, but you did not go in our cars; you chose to ride in a vehicle for which we are not responsible.

The courts have not favored these arguments. Not long ago Mr. Thorpe entered a New York Central Railroad train at Syracuse, without asking for a drawing-room car-ticket, his purpose being to ride in one of the ordinary passenger cars to Auburn. There were two plain cars attached to the train. He passed through them both, seeking a seat, but could not find one. Most of them were filled with passengers; a few, as usual, with handbags and overcoats; there were none vacant, and several persons were obliged to stand up or sit upon the wood-box, for want of seats. Thorpe passed forward into the drawing-room car. There was no doorman stationed to forbid him; the objection taken in some of the cases, that a passenger may not force his way into a car which is guarded under rules of the company, did not arise. He entered the car without opposition, found a vacant seat, and took it. In due time the drawing-room-car collector called upon him for the extra charge. He declined to pay it; said that he had taken the seat only because the other cars were full; and declared that he was willing to go back to the ordinary car whenever he could have a seat there. The porter of the drawing-room car then attempted to eject the passenger from that car by force, and for this assault Thorpe sued the railroad company. The defence made was simply that he had

sued the wrong defendant; that the porter was the servant of Wagner, the owner of the drawing-room car, not of the railroad company; and that the latter company was in no respect responsible for his acts, even if wrongful. The court said that the persons in charge of a drawing-room car are to be regarded and treated, in respect of their dealings with passengers, as the servants of the railroad company, and that the latter company is responsible for their acts towards passengers to the same extent as if it selected them and paid their wages. In the ordinary management of railroad trains, these cars are mingled with the other cars of the company, are open to passengers generally, are apparently a part of the train, and the manner of conducting the business amounts to an invitation by the railroad company to the public to use them. Passengers cannot know what private or special arrangements, if any, exist between the company and third persons, under which these special cars are run; and a passenger who takes one of these cars has a right to assume that he does so under a contract with the railroad company, and that the servants in charge of that car are its servants.\*—In an Ohio case the same question arose as to personal injury. The traveller in a sleeping-car had his head bruised by the porter letting the upper berth fall upon it as he was arranging the car for the night. The blow affected the spine, and partial paralysis resulted. The injured person sued the carrying company, which sought to throw the responsibility on the sleeping-car owners. And this case seems stronger than the other, for the negligence was in the manipulation of the berths, and had no direct relation to the transportation which the railroad company had undertaken. But the court held that the railroad company was

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\* *Thorpe v. New York Central, &c., R. R. Co.*, 76 N. Y. 402. One point made in the case was that Thorpe ought to have formally asked the conductor to clear away the hand baggage from one of the seats and assign it to him; but the court said that this is not a passenger's duty; it is the duty of the company's servants to keep the seats available for passengers.



responsible to travellers for its whole train, for all cars alike; its contract with the sleeping-car company was a matter that travellers are not supposed to know.\*—Losses of baggage have given rise to like decisions. In a Massachusetts case a San Francisco passenger over the Lake Shore road bought a sleeping-car ticket at Cleveland for a berth in the car "China." At Toledo, he left the car for dinner, but first asked an employé in the car if he should leave his baggage, and would it be safe. The employé answered yes. But when the traveller returned, the "China" had been switched off, and the hand-baggage of the passengers carried into another car which had been substituted for it. In this transfer this passenger's valise was lost, and he sued, not the Wagner Car Company, which owned the "China," but the Lake Shore Company. The defendants said, sue the owners of the "China;" but the court decided against that defence. The traveller's contract for transportation being with the Lake Shore Company, the fact that they had private arrangements with another corporation as to the terms for drawing a particular car, in which the traveller was not interested or concerned, made no difference in his right to sue them for negligent loss of his baggage.†

Can a passenger hold a palace or sleeping car company responsible if his apparel, watch, or money is lost or stolen while he is asleep? Three or four decisions have been rendered, all to the general effect that the car company is not liable; the passenger must take care of his own baggage. There was Smith who "turned in" in the Pullman car between Chicago and St. Louis with \$1180 in his vest pocket, and put the vest under his pillow; but in the morning the money was gone. There was Welch, riding between Detroit and Buffalo, who lodged his overcoat in the vacant berth overhead, and could not find it

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\* C. C. & I. Ry. Co. v. Walrath, *Weekly Cin. Law Bulletin*, Feb. 10, 1878.

† *Kinsley v. Lake Shore, &c., R. R. Co.*, 19 Alb. L. J. 113.

next day. There was Blum, who lost \$3135 between Columbus and Memphis in precisely the same way as Smith, except that Blum got up in the night to get a drink of water, whereas Smith seems to have kept his head on his pillow over his vest all night. In all these cases the courts decided that the car company is not responsible for the passenger's baggage, because the company does not profess to take any charge of the man's clothes or watch or money or valise or umbrella, etc.; he is supposed to keep them in his own care.\* Generally, the palace-car ticket has a notice on it to this effect. The lawyers argued that the companies were liable as carriers. But the courts decided the palace-car company is not a carrier; the railroad company does the carrying; all the palace-car undertakes is to let to the passenger a special seat or berth while he is on the way. Then the lawyers propounded a theory that the companies were liable as innkeepers! But the courts said, in effect, that this was nonsense.

#### THE TIME-TABLE AND THE LAW OF DELAY.

The judges say that there are two grounds upon which the engagements of a railroad company may be enforced: one is that the company owes a duty to the public at large to manage its road and trains properly; the other that it has made an agreement with the individual passenger to carry him through a specified trip. Courts have been very ready, when they could not do justice upon one of these reasons, to employ the other. Thus, some of the lawsuits arising out of delay are decided upon the ground of breach of contract; others on that of failure of duty. Upon one ground or the other, the courts have, in recent years, shown a strong disposition to hold a company liable for any im-

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\* *Pullman Palace-Car Co. v. Smith*, 73 Ill. 360; *Welch v. Pullman Palace-Car Co.*, 16 Abb. Pr. N. S. 352; *Blum v. Southern Pullman Palace-Car Co.*, 22 Int. Rev. Rec. 305.

mediate losses sustained by a passenger through delays of trains. The companies usually publish their time-tables; and there is a noted English decision that this creates a contract with whoever buys a ticket, that the train shall start as advertised. In this case the managers distributed a time-table, but afterwards discontinued one of the trains, and omitted to advertise the change. A passenger bought a ticket, supposing he could go by the omitted train; but when he came to the depot, no train was running, and he lost five pounds by his failure to reach the other place punctually. Hence a lawsuit for his damages. The company's lawyer argued that these advertisements were not contracts, but only announcements of what was intended. Suppose a church-service is advertised, but, for some reason, is not held; to charge the preacher with damages would be absurd. Suppose a merchant advertises that he has certain goods for sale, and when a customer comes he finds they have been all sold; no one imagines the customer has any ground of complaint. But the court said they would not treat the published advertisements of a railroad company as mere waste paper. Advertising to run a train at a given hour is an offer to carry any person at that hour who buys a ticket; and when a traveller buys a ticket for that train, the offer is taken up, and there is an agreement. If the company wishes to change the hours, new notice must be published.\*

It sometimes happens that extraordinary accidents or unforeseen causes prevent or delay running trains as advertised. If the company can show that all reasonable care and pains were taken to run punctually, but that delay was caused by circumstances which could not be anticipated or prevented, it will stand excused; for contracts of this kind are not enforced when performance has become impossible without the person's fault. The railroad running through Salem, in New Hampshire, advertised a morning express-train to stop at Salem for passengers,

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\* *Denton v. Great Northern Ry. Co.*, 5 El. & B. 880.



at 8 45. Mr. Gordon came to the depot and bought a ticket for that train; but it passed through without stopping, and he brought suit for having been left behind. The court said he was entitled to damages unless the company could prove a good excuse. For excuse, the company showed that ample cars for all the ordinary travel were provided and run; but that on this particular day a camp-meeting, or picnic, or excursion, or some unusual gathering unknown beforehand to the managers of the road, brought an immense crowd of passengers to take the train at Lawrence—a station some short distance before Salem—and these filled the seats, aisles, platforms, and even the baggage-cars as full as they would hold. It was positively dangerous to take on any more. In addition, the track leading out of Salem depot was on a rising grade; and if the train, so heavily loaded, had stopped there, it could not have been started again. There were a hundred passengers at Salem, besides Gordon, waiting to take the train. And the conductor ordered the engineer to run through without stopping simply because he could not take more; but when he reached Manchester, he sent back a special train and brought the Salem crowd in as early as was in his power. The court said that these facts excused the company. The conductor had done the best that was practicable.\*

Probably conductors usually do the best they can to run the trains on time, and this may be a reason why there are very few complaints made in the courts for delaying passengers. The traveller generally contents himself with expressing his opinion during the journey. Another reason for few complaints may be that it is only a small part of the traveller's trouble and loss which courts allow him to recover. Suppose a young man is going to Washington to pass a competitive examination for an office. He takes a ticket to New York by a train which is due there in season for him to take the night train and go through;

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\* *Gordon v. Manchester, &c., R. R. Co.*, 52 N. H. 596.

but his train is late in, he misses the connection, is delayed a day, and before he arrives the examination has been held, and the appointment goes to some one else. Can he make the company pay for his disappointment about the office? Or suppose a lecturer is announced for a given evening, and he starts by railway in good season, but, through the fault of the train, he fails to arrive; or an intending bridegroom is brought to town too late for his wedding; or a physician, hurrying to a patient in extremity, is delayed till the sufferer's death has made the trip useless? Can persons sue for such losses or mortifications or disappointments as these? No. The courts require the companies to make compensation for only the actual loss or injury that can be proved as the direct, necessary result of the delay—value of the time lost, positive injury to health from exposure, cost of a special train or wagon to carry one onward, or hotel bill incurred in staying overnight. Items like these, which the belated traveller generally cares very little about, are chiefly what he would get by complaining to the courts.

There was a dancing-master who lived at the Isle of Hope, in Georgia, and taught pupils in Savannah. The places are eight miles apart, and he held a commutation ticket over the railroad, and was wont to go on the noon train. He had a class of forty-five pupils, paying him, altogether, about thirty dollars a lesson. And, towards the 23d of April, which was the last lesson-day of a quarter, he made arrangements to give a ball in Savannah, hired a hall, engaged musicians, and had tickets printed. The company discontinued the noon train on the 23d, in order to run special trains for a celebration; and the unfortunate teacher did not hear of the change in season, and lost, so he complained, the opportunity of giving the lesson and the profits of the ball. The court said the company ought to pay him what he had actually lost. But as to the lesson, he could only claim the extra cost of going to give it on another day; and as to the ball, he must prove what persons would

have bought tickets, supposing he had reached Savannah in season.\*—There was an odd behind-time case in Nebraska. A train, running three quarters of an hour late, was struck by a tornado and upset, and a lady passenger was badly hurt. As the path of the tornado lay directly across the track, it was proved that at the point on the road where the train should have been, according to the time-table, at the moment of the accident, no storm was witnessed. So the passenger thought the company ought to pay her doctor's bill. "For," said she, "if the train had been run on time, it would have passed the tornado's path beforehand, and I should not have been hurt." But the court said this was asking too much. "You were hurt by the tornado. Now, the neglect of the conductor and engineer in allowing the train to be behind time had no sort of tendency to produce the tornado."†

#### WHAT IS BAGGAGE?

This is a question which often arises in the courts. A traveller who sues for a lost trunk is questioned as to its contents, to ascertain whether the articles were such as the person might reasonably and naturally carry for use on the journey. These things are usually clothing, money for travelling expenses, a few books for reading while on the way, a watch, a lady's jewelry such as she may wisely use on the journey, and the like. For whatever the jury thinks a traveller might properly carry for personal use, the railroad company is liable, unless there was some special arrangement for the traveller to take the risk. In modern practice, there usually is such an arrangement, more or less distinct. The passage-tickets generally contain a stipulation that the company will not be responsible for more than one hundred pounds in weight or one hundred dollars in value, unless notice is given

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\* Savannah, &c., R. R. Co. v. Bonaud, 58 Ga. 180.

† McClary v. Sioux City, &c., R. R. Co., 3 Neb. 44.



and extra freight paid. And although the decisions have differed somewhat, and the law is not uniform in all parts of the country, yet, generally, if a traveller accepts a ticket thus expressed, knowing the contents, he is bound by the stipulation. Independent of these special contracts, the usual doctrine has been that whatever a traveller may reasonably wish to use upon the journey is lawful baggage. At the present day, in many parts of the country, a claim that duelling pistols in a man's carpet-bag were part of his baggage, because he intended to use them on the journey, might not be allowed. But in past years, and at the South and West, such a claim has been sustained in several cases. The decision would probably turn on the questions whether the pistols were carried for sale or traffic, or for the personal use and protection of the passenger, and whether it was usual for travellers so to carry them. Undoubtedly, a man going upon a hunting or fishing excursion may carry his rifle or fishing-tackle, and may recover the value of either as "baggage" if lost by the railroad company. In war times, a detachment of troops was once sent by train, with a surgeon in company to treat any injuries the men might sustain, and this surgeon carried the instruments which he thought he might want. These were decided to be his baggage.\*—There have been several cases about money in trunks, resulting in the general rule that a reasonable sum of money for use throughout the journey is properly a part of one's baggage; though it must be packed in a prudent manner. In all these questions, the intention—reasonable, under the circumstances, in the opinion of the jury—of using the article during the journey is the chief guide. There was once a trunk lost, and the company conceded it must pay for all the contents except an opera-glass; an opera-glass, the lawyer contended, was not baggage. But the judge said that if the passenger carried it for the purpose of using it upon the

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\* *Hannibal R. R. v. Swift*, 12 Wall, 282.

trip, the company was liable.\* The journey, in this doctrine, means the entire journey which the traveller has undertaken, not merely the portion of it over which the railroad which has lost his trunk is carrying him. Articles for use at one's temporary stopping-places are included. Goods for sale are often carried in the trunks of merchants; and persons removing from one home to another pack things in their trunks which they wish to use, not upon the journey, but after they become settled in the new home: these things are not baggage; the passenger carries them at his own risk.—The story of a recent case is that of a Russian countess who left home intending to travel through Europe, Asia, Africa, and, finally, America. When, at length, she reached this country, she brought six trunks. They were common-looking and worn, but contained elegant and costly dresses, rich jewelry, and valuable laces. She took two of these trunks with her upon a trip from New York to Niagara, one of which contained the chief quantity of her laces; they were ancient, beautiful, and unique, and valued by her at \$200,000. Upon the journey this trunk was broken open and more than two hundred yards of lace stolen. She sued the company. The defence was that she ought not to have carried such valuable property in common-looking trunks and without giving the baggage-man any notice what measure of care was needed. The court said that she was bound to give the information if she was asked, and to pay extra freight if demanded. If she had practised any concealment, or had refused to answer proper questions, or had answered falsely, the company would have had a good defence. But it was not her duty to volunteer information.†

How far does the liability for baggage attach to the articles which the passenger carries in his own charge? Most of the cases have turned upon the passenger's failure to take good

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\* Toledo, &c., Ry. Co. v. Hammond, 33 *Ibid.* 379.

† New York Central, &c., R. R. Co. v. Fraloff, 20 *Alb. L. J.* 409.

care of his valise, and, no doubt, if he assumes to carry his things in his own care and is negligent, that is a complete defence to any claim against the company. In an English case, the traveller left the car at a refreshment station to get lunch, leaving his portmanteau behind him. On returning to the train, he could not find the car he was previously in, and concluded it must have been taken off. This was a mistake; the car went through, but the passenger rode the residue of the trip in another one. He did not, however, obtain his portmanteau for a long time, and, when he recovered it, a part of the contents had been stolen.\* In a New York case, a passenger laid his overcoat upon the seat by his side, and when he reached his destination he forgot to take it with him on leaving the cars. The train went onward, bearing the neglected coat. A friendly fellow-passenger pointed it out to the conductor, but that official took no care of it till the train reached the terminus, when he sent a brakeman to secure it. But meantime it had been stolen, perhaps by the friendly passenger; no one knows. In both these instances the courts held that the companies were free of any claim, because the passengers had been careless.†

A recent and important railroad case was decided last year in the New York Court of Appeals. It turned upon the value of the property lost, which the court held was excessive. The circumstances were that Mr. Weeks arrived in New York, by New York & New Haven train, early one morning in 1871. At that date, the locomotive left the cars at Forty-second Street, and they were drawn by horses down to the Twenty-seventh Street depot. The car in which Weeks was brought was left for a short time standing in Fourth Avenue, waiting for the horses, and without any guard of brakemen or other employés. Weeks was carrying upon his person a package of United States bonds to the

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\* *Talley v. Great Western Ry. Co.*, *L. R. 6 C. P.*, 44.

† *Tower v. Utica, &c.*, *R. R. Co.*, 7 *Hill*, 47.



value of \$16,000. Three men entered the car as Weeks was coming towards the door to leave it, assaulted him with violence, robbed him of the bonds, and ran away unhindered by the company's agents. His action against the company for the loss has been decided against him in both courts, on the ground that \$16,000 is too much for a passenger to carry and expect the company to care for. The jury found that Weeks was not negligent in his manner of carrying the bonds, and that the company was negligent in allowing rowdies access to the car; yet the Court of Appeals decided that any liability of the company arising on these facts must be limited to such reasonable and moderate property as a railroad company naturally expects passengers to carry for use on their journeys. The companies are not required to take precautions as if passengers generally had fifteen or twenty thousand dollars in bonds in their pockets.\*

An opposite aspect of the hand-baggage question was presented in a Georgia case, where the passenger's valise contained gold coin and securities to the value of \$87,000. He carried it by hand, instead of having it checked; but, on arriving at his destination, the conductor demanded forty dollars as freight upon the money. Passenger refused to pay; and conductor took the bag away from him, claiming that the company had a lien on the baggage for the charges. And the court so decided, and said that although the passenger carried the bag himself, yet it might be retained for freight; that whatever is carried into the passenger-cars as baggage is deemed to be in possession of the conductor so far as to authorize him to assert a lien upon it.† It is not easy to see why possession of a bag of gold which is sufficient to sustain a claim for freight and a lien for payment is not sufficient to create a carrier's liability.

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\* *Weeks v. New York, New Haven, &c., R. R. Co.*, 9 *Hun.* 669; 72 *N. Y.* 50.

† *Hutchings v. Western, &c., R. R.*, 25 *Ga.* 61.

## CHAPTER XXXIX.

## TELEGRAPH COMPANIES.

THE entertaining law-cases about telegraphs relate chiefly to accidents caused by their poles and wires; making contracts by telegraph; and responsibility for telegraphic blunders.

## LOOSE POLES AND WIRES.

According to an old-fashioned doctrine of the courts, whoever owns a tract of land owns upward to the skies; and no one can build, without the owner's leave, in the air above the tract, any more than he can on the surface or in the soil. Even a balloon sailing across a man's farm, and, still more, a hanging telegraph-wire, would be a theoretic trespass if it were not that Congress and the State legislatures have now passed laws giving telegraph companies a right of way. Under these laws, the companies have gradually spread a network of wires over the whole country.

But this privilege of running telegraph-wires over the land, and the parallel one of laying cables under navigable waters, are granted upon a stringent condition that travel and navigation must not be obstructed. This leaves a company liable for any injury its structures may cause if they become an obstruction. The company has the right to erect posts and hang wires along a road, or drop its cables across a river. Land-owners cannot interfere with them, but can only seek damages. Highway officers cannot cut them down, nor can port-wardens pull them up, as obstructions, for they are authorized by law. But if the wires trip carriages, or the cables wreck vessels, the companies must pay. The Western Union Telegraph Company has several cables

crossing the Hudson River at Troy. Vessels plying up and down the river have usually passed without interference; but the tow-boat *W. E. Cheney* one day caught her keel in one of the cables, and was badly damaged. It appeared that the cable was not laid in the best place and way to avoid causing such injuries, and the Court of Appeals held the company liable for damages. True, it had the right to swing the wire across the river, under water; but the right of vessels to pass up and down was paramount. Bridges, telegraph-wires, wharves, and all other structures tending to interfere with the free navigation of a river must be constructed so as to cause the least possible interference, or their owners will be liable.\*—So upon highways. In a Maine case, the telegraph-wires in Northport stretched, and became slack. One day the stage-coach, in driving to the post-office, passed under the depending wire, which caught the upper part of the coach and upset it, and a lady passenger was injured. The telegraph company said they were not liable, because they had not obstructed the middle part of the road, where vehicles usually ran. But the court said the people had the right to ride back and forth in the full width of the road, and no one could put an obstruction in any part of it.†—A similar opinion was given by the Court of Queen's Bench. A telegraph company was prosecuted for erecting poles in a highway without leave given by any act of Parliament. They remonstrated on the ground that they had carefully placed them where they would not interfere with the usual track of carriages. But the judges said that made no difference; the public had the right to have the whole width of the road left free until leave to put up the posts had been given by law.‡

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\* *Blanchard v. Western Union Tel. Co.*, 60 *N. Y.* 510. *Stephens, &c., Transp. Co. v. Western Union Tel. Co.*, 8 *Ben.* 502, says the same.

† *Dickey v. Maine Tel. Co.*, 46 *Me.* 483.

‡ *Reg. v. United Kingdom Electric Tel. Co.*, 3 *Fost. & F.* 73; 6 *Law Times*, *N. S.* 378.



In Wareham, Mass., the telegraph-wire fell from one pole across the road. A traveller in a horse and wagon came along, saw the wire, but, after examination, concluded that it hung so low that he could safely drive over it, and tried to do so, very carefully. However, the wire caught the hind wheel, threw the wagon over and the driver out; the horse ran away, and a good deal of damage was caused.\* In a Colorado case, the company's superintendent was placing a wire along a new route. He allowed it to hang low for a short time across the road while the work was going on. Meantime a man on horseback passed, the wire tripped up the horse, horse and man were thrown down, and man badly hurt.† In an Indiana case, the Western Union posts grew gradually rotten, and, at length, one evening, posts and wires fell down in the highway, the telegraph company knowing nothing about the casualty. An hour later, a traveller in a carriage ran into the wreck, in the dark, and was upset. In all these instances the courts considered that the companies were liable to pay all damages which their wires had caused. Their right to build their lines did not give them any exemption from making good injuries which the lines occasioned.‡

#### CONTRACTS BY TELEGRAPH.

There has been great difficulty in determining how to enforce the various business engagements which merchants are constantly making by telegraph. To apply former rules of evidence to telegraphic despatches is quite impracticable without some modifications, and the courts have not yet determined what modifications shall be allowed. Suppose a telegram is produced offering "best United States documents," or ordering "six boxes common and two extra" shipped at once, or saying "sell my

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\* *Thomas v. Western Union Tel. Co.*, 100 *Mass.* 156.

† *Western Union Tel. Co. v. Eyser*, 2 *Col. T.* 141.

‡ *Western Union Tel. Co. v. Levi*, 47 *Ind.* 382.

maize and buy rye." Assume it to be ascertained beyond mistake that "documents" means greenbacks, what goods are meant by "common" and "extra," or that "maize" and "rye" are stock-brokers' private signals for Maine Central and Rock Island shares, there is still much to be done before courts will accept the despatch as a proper foundation of any decision. Not only are there serious difficulties in the way of procuring the original despatch, but there is also a perplexing question peculiar to telegraph business: Which is the original—the despatch which was written and handed in at the office at one end, or the one which the operator at the other wrote out and delivered? The two will often differ by mistake in transmission; but suppose they do not differ, which one is the original, that must be obtained and produced? This question is answered in the courts differently in different cases, according to whether the sender or the recipient is the person selecting the telegraph as the means of communication. For one who chooses the telegraph ought to be considered as taking the risk of mistakes rather than the one who, having had no choice in the matter, receives the message. Also, the decision may depend on whether the recipient is suing the sender to charge him upon the message he sent, or is endeavoring to justify himself by showing that he acted according to the message he received. In a majority of cases, the message as the sender wrote it is the original, and this is the one which must be hunted up and exhibited to satisfy a court. In special cases, the paper delivered is the original. If the suit were to recover damages from the company for a mistake in transmission, both transcripts of the message might be needed.

A variety of questions arise like this: May one assume that messages were, in fact, sent and delivered as they appear to have been, or must every little fact about the transmission be proved by calling witnesses. And the courts are generally agreed that they will act in part on the probability that telegraphic business is conducted with regularity, accuracy, and success, and will

call upon whoever disputes the transmission of a message which appears all right to prove his objection. If it has been proved that a telegraphic message was sent, there is as good reason, so the court held in one case, for presuming that it was received as there would be in the case of a letter sent by mail; if it was not received, it must be proved. There was a case where a provision-dealer wanted to send a drove of hogs to St. Louis, and he telegraphed to a steamboat by her name to ask if they could be carried. He received this answer back, "Will take your hogs," signed in the name of the captain of the boat. But when the time came, the boat would not take the hogs, and he sued for breach of contract. On the trial he had no witness to prove that the despatch was signed by authority of the master or owners. But the court said it was an answer to a question which was telegraphed to the boat, and, therefore, it was probably sent by authority from the boat. The court would presume that it was authorized; if it was not, the boat-owners might show the negative.\*

The general idea is that an acceptance by telegraph takes effect from the time when it is furnished to the operator in the telegraph-office to be sent. This has been decided in several lawsuits. It has been the rule as to letters for many years; and since telegraphs have come into use, the courts have said that the rule which has been established for letters must apply to despatches. The reason given in one of the earlier decisions is this: that unless mailing a letter of acceptance is considered to complete the contract, a contract could never be closed by mail; for if the person making the offer is not bound until he receives the acceptance, then the one who accepts ought not to be bound until he receives notice of receipt of his letter, and this writing back and forth must go on forever. Therefore, the judges said that the sending the letter, not the receiving it, should govern.

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\* *Taylor v. The Robert Campbell*, 20 Mo. 254.



In a New York case, a New Orleans banking firm had a large quantity of Mexican dollars for sale, and a New York firm inquired the price. The New Orleans firm telegraphed an offer to "sell \$50,000 at  $7\frac{1}{4}$ ." The New York firm promptly sent a message accepting the offer. But there was some derangement of wires between the two cities, and the acceptance did not reach the bankers at New Orleans until the fourth day after it was sent. Meantime, they had given up hearing, and had sold their dollars to some one else. Then there was a lawsuit for damages for their not delivering the dollars to the New-Yorkers. The New Orleans people argued that the rule as to sending a letter being an acceptance ought not to be extended to telegrams, and the judge who first decided the case took the same view. But the Court of Appeals decided the other way, and said that as the parties had agreed on communicating by telegraph, and the New-Yorkers had done all in their power to forward their acceptance, it went at the risk of the New Orleans firm; they were therefore charged with damages for not acting on the acceptance, although they did not get it in season.\*

But the basis of these decisions is that there was some understanding between the parties adopting the telegraph as the means of communication. When one telegraphs an offer, he is understood to appoint the telegraph as a safe way of answering; and he takes the chances that if an acceptance is despatched in due season, it will come through punctually. Whoever, without some such permission from another, selects the telegraph as a means of communicating with him will generally be considered as taking whatever risks of error or delay are incident to the method; he cannot throw them upon the person addressed.

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\* *Trevor v. Wood*, 36 N. Y. 307.

## TELEGRAPHIC BLUNDERS.

When telegraphs first came into operation, and lawsuits began to arise from mistakes in messages, the courts sometimes decided that the companies were subject to the strict liability imposed upon "common carriers." Recently the courts have looked at this question more closely and correctly. They have taken notice that the companies do not really undertake to carry anything in the nature of property, but to render a service, do a work. They erect a wire, with a signal apparatus at each end; when a message is given them to transmit, they engage that the operator at this end shall make the signals called for by the message; that these shall, through electricity, move the signal apparatus at the other end; and that the operator there shall transcribe the signals and deliver his memorandum of them. Nothing is carried, except between the farther station and the person addressed. There is a trivial bit of carrying between the farther office and the recipient, but it is altogether incidental. Hence the legal decisions which treated telegraphs as carriers are now generally considered to have been erroneous. The present idea is that the companies are liable only on the ground of some fault, neglect, or omission in performing the service which they undertook.

Even upon this narrower ground there have been some cautionary cases, in which senders have recovered large damages against the companies. A noted case occurred in Ohio. A dry-goods-seller there sent this message to a dealer in Bay State shawls at New York: "Send one handsome eight-dollar and twenty-four three-twenty-fives, Bay State." But the operator rendered it "hundred" instead of "handsome." The shawl-dealer forwarded one hundred eight-dollar shawls; and as the dry-goods man would only pay for one, he sued the company for the freight and depreciation, and won his case.\* In another,

\* *Bowen v. Lake Erie Tel. Co.*, 1 Am. L. Reg. 685; *Allen Tel. Co.*, 7.

a gentleman in New York telegraphed to a Philadelphia florist, "Send me two hand bouquets, very handsome, one of five and one of ten dollars." The message reached Philadelphia, "Send me two *hund* bouquets," which the operator wrote "hundred;" and before the unfortunate florist got word of the error, he had purchased costly flowers in great quantity, which withered on his hands. He was considered to be entitled to recover compensation for his loss from the company.\*

A Chicago house telegraphed to an Oswego house desiring them to send five thousand sacks of salt, but the operator who wrote out the message substituted "casks" for "sacks." A sack is about fourteen pounds, and a cask about three hundred and twenty, hence the erroneous message led to chartering a vessel, and sending an immense quantity of salt, which was ultimately sold at a great loss. The company was adjudged liable.†—In a case in New York, a firm at Washington who made a business of dealing in New York stocks telegraphed to their brokers in New York, "If we have any old Southern on hand, sell same before Board. Buy five Hudson at Board." This meant, according to the course of business, Sell our Michigan Southern Railroad stock, and buy five hundred shares of Hudson River Railroad stock. But the operator wrote "hundred" instead of "Hudson;" hence the brokers sold all the Michigan Southern stock of their Washington correspondents before the Board met, and at the Board bought five hundred shares of the same stock. Michigan Southern went down, and Hudson River went up. And the court decided that the Washington people could recover both what they lost on the five hundred shares of Michigan Southern, and what they would have made on five hundred shares of Hudson River.‡

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\* N. Y., &c., Tel. Co. v. Dryburg, 35 Pa. St. 298; Allen Tel. Cas. 157.

† Leonard v. New York, &c., Tel. Co., 41 N. Y. 544.

‡ Rittenhouse v. Independent Line Tel., 44 N. Y. 263; 1 Daly, 474.



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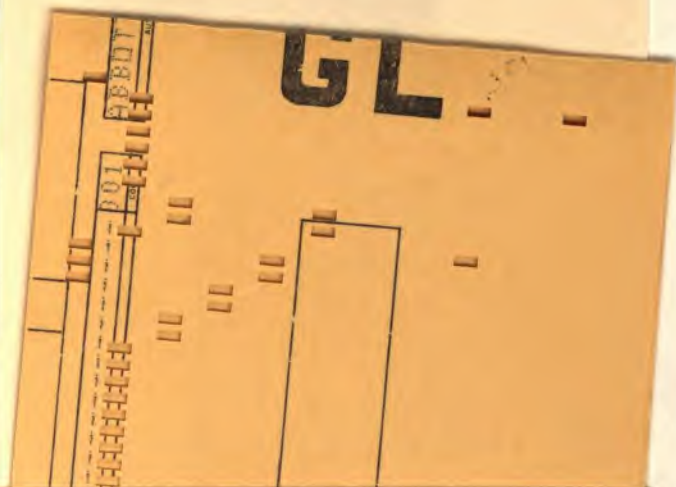




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